

United States
Court of Appeals
for the Ninth Circuit

SEARS, ROEBUCK & CO., a Corporation,

Appellant,

vs.

METROPOLITAN ENGRAVERS, LTD.; METROPOLITAN MAT SERVICE, INC.; GREGORY F. DUFFY, AUBREY A. DUFFY, ALFRED SMUTZ, WALTER C. DUFFY and FRANK R. BLADE,

Appellees.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California,
Central Division.

FILED

FEB 17 1955

PAUL P. O'BRIEN,

CLERK

United States
Court of Appeals
for the Ninth Circuit

SEARS, ROEBUCK & CO., a Corporation,
Appellant,

vs.

METROPOLITAN ENGRAVERS, LTD.; MET-
ROPOLITAN MAT SERVICE, INC.;
GREGORY F. DUFFY, AUBREY A.
DUFFY, ALFRED SMUTZ, WALTER C.
DUFFY and FRANK R. BLADE,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court of the United States, Southern
District of California, Central Division

No. 14079-PH

SEARS, ROEBUCK & CO., a Corporation,

Plaintiff,

vs.

FRANK R. BLADE; METROPOLITAN ENGRAVERS, LTD., a Corporation; METROPOLITAN MAT SERVICE, INC., a Corporation; GREGORY F. DUFFY; AUBREY A. DUFFY; ALFRED SMUTZ; WALTER C. DUFFY; BARNARD ENGRAVING COMPANY, INC., a Corporation; JAMES G. BARNARD; MARGARET DAVIS; JOHN DOE; JANE ROE; and JOHN DOE COMPANY, a Corporation,

Defendants.

AMENDED COMPLAINT FOR
DAMAGES FOR FRAUD

Plaintiff by leave of Court first had and obtained files this amended complaint complaining of defendants, and each of them, and alleges:

I.

The jurisdiction of this Court to hear this cause of action is based upon the original jurisdiction of this Court to hear "all civil actions where the amount in controversy exceeds the sum or value of \$3,000 exclusive of interest and costs and is between

citizens of different states," as provided by Title 28 U.S.C. Section 1332(c) (1). [2*]

II.

That the matter in controversy exceeds the sum or value of \$3,000 exclusive of interest and costs.

III.

That plaintiff is a corporation organized and existing under and by virtue of the laws of the State of New York with its principal place of business in the City of New York. That at all times herein mentioned plaintiff has been engaged in the business of selling general merchandise in retail stores and by mail order. An administrative division of its business which maintains stores in and near the City of Los Angeles, California, is known as the Los Angeles Group. That in the course and conduct of its said business, plaintiff, in its Los Angeles Group of stores, engages and has engaged extensively in newspaper advertising of and concerning the said commodities which it markets and sells, as aforesaid, and in the course of the preparation and composition of such advertisements throughout the period of time herein involved has purchased from the defendants "Engravers" and "Barnard Company" a large number of engravings which were designed to be and were and are used and which the said defendants understood and knew were to be used in the said newspaper advertising of the said commodities. That said engravings were and are used in newspaper and other advertisements.

*Page numbering appearing at foot of page of original Certified Transcript of Record.

IV.

That the defendants, Metropolitan Engravers, Ltd. (hereinafter called "Engravers"); Metropolitan Mat Service, Inc. (hereinafter called "Mat Service"); Barnard Engraving Company, Inc. (hereinafter called "Barnard Company"), and John Doe Company, and each of them, is a corporation duly organized and existing under and by virtue of the laws of the State of California and having its principal office and place of business in the City of Los Angeles, California, and within the Southern District of California. That each of the other named defendants is a citizen of the State of California and resident [3] within the Southern District of California. That the defendants, Gregory F. Duffy, Aubrey A. Duffy, Alfred Smutz and Walter C. Duffy, and each of them, at all times herein mentioned were and now are officers, agents and representatives of defendant "Engravers" and in all of the acts herein complained of acted for and on behalf of said defendant "Engravers." That defendant "Mat Service" at all times herein mentioned was and now is wholly owned and controlled by the same individuals who own and control defendant "Engravers" and at all times had and has the same officers and directors and is in all of its business operations affiliated with and controlled by defendant "Engravers"; all of the acts of the defendant "Mat Service" herein complained of were performed by it as agent and representative of defendant "Engravers." That defendants James G. Barnard, Margaret Davis and John Doe at all

times herein mentioned were and now are officers, agents and representatives of defendant "Barnard Company" and in all of the acts herein complained of they acted for and on behalf of said defendant "Barnard Company."

V.

That for many years, including all times herein mentioned, defendant Frank R. Blade was employed by plaintiff in the capacity of Advertising Manager for the Los Angeles Group of stores owned and operated by plaintiff. That upon accepting such employment, said defendant undertook and agreed and it became his duty to devote his entire time, thought, energy and loyalty during normal business hours to the business of devising, contracting for and supervising advertising of the commodities dealt in by plaintiff, and as a part of such duties he undertook to represent and serve plaintiff in negotiating and contracting for engraving to be done for plaintiff and to be used in connection with its advertising in newspapers, and he undertook as a part of his duties faithfully to serve the interests of plaintiff within the scope of his employment and particularly in connection with the contracts made for advertising and engraving. [4]

VI.

That commencing on or about January 1, 1937, and continuing thereafter throughout the entire period of time until the month of December, 1951, said defendant, Frank R. Blade, as Advertising Manager of the Los Angeles Group of stores owned and operated by plaintiff, negotiated, entered into,

executed and performed contracts with the defendant "Engravers," wherein and whereby said "Engravers" manufactured and sold to plaintiff and plaintiff purchased large quantities of engravings to be used in connection with newspaper and other advertising of plaintiff's commodities. That in the course of the negotiating and the making and execution of said contracts and throughout said entire period of time ending December, 1951, said defendant "Engravers," its officers, agents and representatives above mentioned, and each of them, secretly, fraudulently, unfairly and deceptively conspired and agreed that the defendants "Engravers" and "Mat Service" would pay to, and the defendant Frank R. Blade would receive and accept secret, fraudulent, unfair and deceptive rebates, profits or commissions in the sum of \$400.00 per month in consideration of which said defendant Blade would contract for all engraving to be purchased by the Los Angeles Group of stores owned and operated by plaintiff with said defendant "Engravers" and no other person, firm or corporation, and would permit them to charge and would procure plaintiff to pay them sums of money greatly in excess of the then going price for identical quantities of identical or similar engraving current in the Los Angeles market and at prices substantially in excess of the prices which plaintiff would have been charged by competitors of defendants for like quantities of engraving of like grade and quality. In particular it was agreed between said defendants that plaintiff would be charged and would pay to

said defendant "Engravers" sums of money based upon varying basic prices of \$.033 to \$.044 per unit of engraving, although the fair market price in the Los Angeles area and the prices concurrently charged [5] other purchasers in said area who were competitors of plaintiff for like quantities of engraving of like grade and quality was \$.030, or less; and that, for extra work in connection with such engraving not included in such unit price, equivalent additional charges over and above the fair market price for such extra work would be made by defendant "Engravers" and paid by plaintiff.

VII.

That prior to October 1, 1949, defendant Blade was instructed by plaintiff to contract for part of the engraving for the Los Angeles Group of stores with engraving firms other than the defendant "Engravers." Thereupon the defendants, and each and all of them, contracted, conspired, confederated and agreed with each other that thereafter the engraving business of plaintiff should be divided between the defendants "Engravers" and "Barnard Company" and that no other person, firm or corporation should be allowed or permitted to secure any such business; that such engraving should be done by both of the firms named at the base price of \$.044 per unit and not at the fair market price in the Los Angeles area of \$.030, or less, and that for extra work done, charges would be made at equivalent percentages of increase over the going fair market price thereof. Defendants "Barnard Company," James G. Barnard and Margaret Davis also agreed

with defendant Blade that they would pay him a secret profit or commission amounting to 15% of the gross amount of all monies received from plaintiff for engraving done by defendant "Barnard Company" for said plaintiff. Said agreements were secret, collusive, unfair and deceptive.

VIII.

That from about January 1, 1937, until on or about the 10th day of December, 1951, the agreements and conspiracies set forth in paragraphs V and VI hereof were carried out and executed by the defendants; that during said period of time and pursuant to said agreements and conspiracies all engravings purchased by the [6] advertising department of said Los Angeles Group of plaintiff's stores, excepting those engravings purchased from the defendant "Barnard Company" and hereinafter more particularly identified, were purchased from the defendant "Engravers"; that attached hereto, marked "Exhibit A," and made a part hereof, is a list showing the respective dates and amounts of each such purchase of engravings made by plaintiff from said defendant "Engravers" between February 6, 1942, and November 29, 1951, inclusive; that the total amount so charged by said defendant "Engravers" and paid by plaintiff for engravings purchased by plaintiff from said defendant "Engravers" during said period of time from February 6, 1942, to November 29, 1951, inclusive, was and is the sum of \$563,504.50; that the fair market price and value in the Los Angeles area for such engravings and the price that, except for the aforesaid

agreements, conspiracies and fraud of said defendants, would have been charged plaintiff by said defendant "Engravers" and by others in the engraving business for like quantities of like grade and quality, was the sum of \$421,524.55; that thereby plaintiff was damaged in the sum of \$141,-979.95, no part of which has been paid.

That the dates and amounts of the purchases of engravings made by plaintiff from the defendant "Engravers" during the period of time from on or about January 1, 1937, until on or about February 5, 1942, and the total amount so charged by said defendant "Engravers" and paid by plaintiff for engravings purchased by plaintiff from said defendant "Engravers" during said period of time from on or about January 1, 1937, until on or about February 5, 1942, are not now known by plaintiff, although well known by the defendants, and plaintiff begs leave of this Court to amend its complaint herein to allege such facts and to offer proof thereof as and when ascertained by plaintiff; that plaintiff is informed and believes that the total amount so charged by said defendant "Engravers" and paid by plaintiff for engravings purchased by plaintiff from said defendant "Engravers" [7] during said period of time from on or about January 1, 1937, until on or about February 5, 1942, was in excess of the fair market price and value, and the price that, except for the aforesaid agreements, conspiracies and fraud of said defendants would have been charged plaintiff by said defendant "Engravers" and by others in the engraving business for like

quantities of like grade and quality, but the amount of said excess and the amount of damage suffered by plaintiff by reason thereof are not now known by plaintiff, although well known by the defendants, and plaintiff begs leave of this Court to amend its complaint herein to allege such facts and to offer proof thereof as and when ascertained by plaintiff.

Plaintiff alleges on information and belief that, pursuant to said conspiracies and agreements, said defendants "Engravers," "Mat Service" and its above-named officers, agents and representatives, paid to the defendant Frank R. Blade secret profits, rebates and commissions in sums of \$400.00 per month for each and every month of said period.

IX.

That pursuant to the contracts, agreements, confederations and conspiracies hereinabove set forth in paragraphs VI and VII of this complaint, and during the period of time from on or about October 18, 1949, to on or about November 20, 1951, the defendant "Barnard Company" sold and delivered to plaintiff, and plaintiff purchased from said defendant, a portion of the engravings required by plaintiff during said period of time; that attached hereto, marked "Exhibit B," and made a part hereof, is a list showing the respective dates and amounts of each purchase of engravings made by plaintiff from said defendant "Barnard Company" between October 18, 1949, and November 20, 1951, inclusive; that the total amount so charged by said defendant "Barnard Company" and paid by plaintiff for engravings purchased by plaintiff

from said defendant "Barnard Company" during said period of time from October 18, 1949, to November 20, 1951, inclusive, was [8] and is the sum of \$56,858.81; that the fair market price and value in the Los Angeles area for such engravings, and the price that, except for the aforesaid agreements, conspiracies and fraud of said defendants, would have been charged plaintiff by said defendant "Barnard Company" and others in the engraving business for like quantities of engravings of like grade and quality, was the sum of \$36,837.31; that thereby plaintiff was damaged in the sum of \$20,-021.50, no part of which has been paid.

Plaintiff alleges on information and belief that, pursuant to said conspiracies and agreements, defendant "Barnard Company" and its above-named agents, officers, and representatives paid to the defendant Frank R. Blade fraudulent and secret rebates, profits and commissions in a sum equal to 15% of all monies paid by plaintiff to the defendant "Barnard Company" during said period.

X.

That pursuant to the conspiracies and agreements hereinbefore alleged, and in furtherance thereof, the defendants "Engravers," "Mat Service" and their above-named officers, agents and representatives paid to the defendant Blade, and said defendant Blade received and accepted from them money as a commission, compensation, allowance and rebate in sums which plaintiff alleges on information and belief to have been in excess of \$50,000.00; and pursuant to said conspiracies and agreements above

set forth and in furtherance thereof, defendant "Barnard Company" and its above-named officers and agents paid to defendant Blade and said defendant Blade received and accepted money as commission, compensation, allowance and rebate in sums which plaintiff alleges on information and belief to have amounted to the sum of approximately \$8,250.00. Said sums were paid during a period of time when said defendant Blade was, and was known by the defendants to be the employee, agent and representative of plaintiff.

XI.

That plaintiff had no knowledge of the aforesaid agreements [9] and conspiracies between the defendants, hereinbefore more particularly set forth in paragraphs VI to X, inclusive, of this complaint, or of the or any of the aforesaid acts and conduct of the defendants under and pursuant to said agreements and conspiracies, or of the losses and damages suffered by plaintiff as a result of said agreements, conspiracies, acts and conduct of the defendants, as hereinbefore more particularly set forth in paragraphs VIII and IX of this complaint, at any time or times prior to or until on or about the 10th day of December, 1951.

That on or about the 6th day of July, 1951, plaintiff received an anonymous letter, stating that some unidentified person who engaged in purchasing for plaintiff was receiving secret payoffs, rebates or commissions; that said letter did not identify or contain any information from which plaintiff could identify either the person said to be engaged in

purchasing for plaintiff, or the person or persons from whom purchases had been or were being made, or the transaction or transactions involved; that, upon receipt of said letter, plaintiff commenced an investigation for the purpose of ascertaining whether anyone engaged in purchasing for plaintiff was receiving secret payoffs, rebates or commissions and the persons and transactions, if any, involved; that, during the course of said investigation, plaintiff discovered that its employee, the defendant Frank R. Blade had personally received a check in the sum of \$400.00 from the defendant Metropolitan Mat Service; that thereupon and on or about said 10th day of December, 1951, plaintiff questioned said defendant Frank R. Blade about said check and about his dealings with said Metropolitan Mat Service and the other defendants herein and, during the course of said questioning, the said defendant Frank R. Blade for the first time divulged to plaintiff that he had been receiving secret payments, rebates and commissions from the other defendants herein in connection with his purchases of engravings for plaintiff from said other defendants; that plaintiff then [10] investigated the transactions between the said defendant, Frank R. Blade, as Advertising Manager for plaintiff, and the other defendants, and particularly the various contracts for engraving negotiated by its Advertising Manager, the defendant, Frank R. Blade, on behalf of plaintiff with the other defendants herein, and for the first time learned of the excessive and unfair rates and prices for engraving that had been

and were being charged and collected by said other defendants from plaintiff by reason and means of and pursuant to said secret agreements and conspiracies between said defendant, Frank R. Blade, and said other defendants, all as more particularly alleged hereinbefore.

That at all times herein mentioned prior to on or about December 10, 1951, plaintiff believed that its said employee, the defendant, Frank R. Blade, was an experienced and competent Advertising Manager and was loyal and devoted to the business and interests of plaintiff; that at all said times, plaintiff reposed complete confidence in said Frank R. Blade, both with respect to his capability as Advertising Manager and with respect to his loyalty and devotion to its business and interests, and depended and relied upon him with respect to the proper performance of his duties as its Advertising Manager, including the negotiation of contracts for engravings for plaintiff; that the formulas and techniques for computing rates for engraving work of the nature herein involved were matters with which plaintiff had no familiarity or knowledge and concerning which plaintiff was compelled to and did rely upon the knowledge, experience, expertness, loyalty and good faith of its said Advertising Manager, the defendant, Frank R. Blade.

That by reason of its confidence in and reliance upon its said Advertising Manager, the said defendant, Frank R. Blade, and the secrecy of the aforesaid agreements and conspiracies between him and the other defendants herein, and the concealment

by the defendants of the aforesaid payments, rebates and commissions and of the [11] aforesaid excessive and unfair rates and prices charged and collected by them from plaintiff, the plaintiff did not discover or learn or in any way become aware of, and had no knowledge or means of knowing or learning of, the said agreements and conspiracies between the defendants, or the said payments, rebates and commissions, or the said excessive and unfair rates and prices for engraving before or until on or about said 10th day of December, 1951, as aforesaid.

XII.

That in the acts, agreements and conspiracies above set forth the defendants, and each of them, have been guilty of oppression and fraud and they should be required to pay in addition to actual damages, damages for the sake of example and by way of punishment of said defendants.

Wherefore, plaintiff prays judgment against the defendants, and each of them, as follows: For damages in the sum of \$162,001.45, plus interest, and the additional sum of \$250,000.00 as exemplary or punitive damages; for its costs; and for such other and further relief as may be proper in the premises.

JOHN L. WHEELER,
FRESTON & FILES, and
EUGENE D. WILLIAMS,

By /s/ EUGENE D. WILLIAMS,
Attorneys for Plaintiff.

Duly verified.

Affidavit of Service by Mail attached. [12]

EXHIBIT A

Page 1*

Summary of Payments Covering Billings
by Metropolitan Engravers
for the Period

February 1, 1942, Through November 29, 1951

Voucher Date	Voucher Number	Voucher Amount
February 6, 1942	458955	\$ 1,598.06
" 23, 1942	460931	128.98
March 4, 1942	462540	1,296.62
April 1, 1942	267	1,594.70
" 23, 1942	3925	672.92
" 28, 1942	4227	279.70
May 18, 1942	7378	1,173.99
" 22, 1942	8290	232.97
June 11, 1942	11093	334.60
" 23, 1942	12530	1,158.95
July 15, 1942	15819	771.48
" 21, 1942	16444	472.07
August 17, 1942	19900	419.18
" 17, 1942	19901	641.36
" 24, 1942	20751	345.34
September 15, 1942	23588	1,067.82
" 17, 1942	23968	425.21
October 14, 1942	27512	1,581.91
November 11, 1942	31667	1,942.38
December 9, 1942	35650	1,729.31
" 30, 1942	39077	1,713.22
Total for 1942		\$19,580.77

*Page No. on original copy.

"Exhibit A" Page 2

	Voucher Date	Voucher Number	Voucher Amount
January	5, 1943	39527	\$ 702.06
"	30, 1943	43596	1,080.40
February	26, 1943	47186	1,433.22
March	24, 1943	50924	1,200.12
"	26, 1943	51294	534.82
April	20, 1943	54963	409.04
"	23, 1943	55836	721.35
"	19, 1943	54396	345.92
"	20, 1943	54996	382.30
May	5, 1943	57970	284.11
"	17, 1943	59885	356.30
"	19, 1943	60533	853.24
"	21, 1943	61100	506.36
June	15, 1943	64795	1,270.70
"	25, 1943	67169	661.27
"	29, 1943	67813	412.21
July	7, 1943	69354	433.98
"	15, 1943	70789	189.19
"	28, 1943	73122	722.21
August	12, 1943	76448	385.58
"	12, 1943	76450	826.69
"	26, 1943	78568	441.45
September	1, 1943	79887	538.68
"	16, 1943	83320	726.88
"	22, 1943	84797	577.52
October	7, 1943	88683	1,241.94
"	8, 1943	88907	1,113.99
"	7, 1943	88679	781.27
"	27, 1943	94154	793.48
"	27, 1943	94165	642.78
November	1, 1943	95121	1,149.59
"	10, 1943	99343	1,032.18
"	18, 1943	102582	885.07
"	24, 1943	104935	1,301.23
December	2, 1943	108256	626.09
"	17, 1943	115261	928.82
"	28, 1943	118781	526.14
"	29, 1943	119902	766.89
Total for 1943			\$27,785.07

"Exhibit A" Page 3

Voucher Date	Voucher Number	Voucher Amount
January 6, 1944	123061	\$ 296.05
" 26, 1944	133270	810.32
February 7, 1944	138664	638.58
" 24, 1944	146794	1,043.76
March 2, 1944	149462	437.01
" 3, 1944	151638	494.81
" 16, 1944	155908	299.63
" 24, 1944	159036	736.75
" 30, 1944	162646	826.54
April 18, 1944	171205	1,718.59
" 21, 1944	172643	1,116.03
May 4, 1944	177966	609.28
" 19, 1944	186112	870.69
" 19, 1944	186124	1,085.69
June 12, 1944	195894	738.15
" 14, 1944	198455	1,164.95
" 23, 1944	202645	879.66
July 13, 1944	212126	1,459.29
" 20, 1944	216289	436.61
August 10, 1944	225685	1,789.10
" 11, 1944	225786	251.08
" 16, 1944	227980	913.17
" 31, 1944	234869	536.66
September 20, 1944	245372	1,901.99
" 27, 1944	248934	967.49
October 4, 1944	252793	554.34
" 13, 1944	258521	1,709.88
" 30, 1944	265351	406.31
November 3, 1944	268928	1,152.55
" 3, 1944	269164	920.32
" 13, 1944	273471	947.01
" 30, 1944	4900	1,440.06
December 11, 1944	9681	2,203.05
" 29, 1944	19286	887.23
" 29, 1944	19426	387.67
Total for 1944		\$32,630.30

"Exhibit A" Page 4

Voucher Date	Voucher Number	Voucher Amount
January 29, 1945	35200	\$ 394.66
" 29, 1945	35359	811.29
February 9, 1945	39885	469.65
" 20, 1945	44665	1,402.37
March 5, 1945	49790	597.82
" 14, 1945	54265	398.98
" 23, 1945	59038	1,063.98
April 3, 1945	63160	235.62
" 20, 1945	73956	750.87
" 27, 1945	76971	1,075.56
May 18, 1945	88797	957.70
" 28, 1945	93036	583.84
June 25, 1945	106847	3,061.37
July 16, 1945	117117	255.61
" 23, 1945	119978	2,207.91
August 21, 1945	133433	2,016.56
September 17, 1945	145270	1,823.27
October 15, 1945	284236	2,041.97
November 2, 1945	293159	3,727.33
" 29, 1945	306248	3,178.83
December 28, 1945	320581	1,215.42
<hr/>		
Total for 1945		\$28,270.61
<hr/>		

"Exhibit A" Page 5

Voucher Date	Voucher Number	Voucher Amount
January 7, 1946	325070	\$ 1,473.13
" 25, 1946	335997	1,564.68
February 21, 1946	351884	2,170.49
" 26, 1946	353563	1,426.85
March 6, 1946	358506	1,922.36
" 26, 1946	369283	1,216.37
April 3, 1946	374004	1,142.48
" 8, 1946	376508	4.59
" 17, 1946	382697	1.88
" 23, 1946	386526	1,835.33
" 27, 1946	389788	967.66
May 13, 1946	398434	1,581.65
" 18, 1946	402919	23.77
" 20, 1946	404291	994.12
" 28, 1946	410320	788.09
June 3, 1946	413067	1.98
" 17, 1946	423387	1,190.24
" 26, 1946	429881	1,514.75
July 16, 1946	442793	755.51
" 19, 1946	444093	1,807.59
August 12, 1946	457755	2,670.72
September 6, 1946	467945	4.30
" 9, 1946	469448	1,624.48
" 16, 1946	473565	2,253.26
October 9, 1946	512875	10.60
" 17, 1946	518154	3,041.20
" 28, 1946	524633	2.62
November 5, 1946	530446	20.46
" 11, 1946	534337	2.62
" 15, 1946	25578	3,137.21
December 18, 1946	30185	3,591.99
" 31, 1946	560238	5,305.00
Total for 1946		\$44,047.98

"Exhibit A" Page 6

	Voucher Date	Voucher Number	Voucher Amount
January	31, 1947	578636	\$ 3,027.37
February	12, 1947	33578	1,499.03
March	10, 1947	38576	5,277.13
April	4, 1947	53667	5,839.26
"	30, 1947	72351	4,966.65
May	20, 1947	85389	3,478.26
June	13, 1947	100607	1,935.08
"	18, 1947	103437	1,030.71
"	24, 1947	106637	3,105.51
July	30, 1947	130354	6,922.69
August	19, 1947	143418	3,181.14
September	9, 1947	158518	4,078.63
October	8, 1947	181402	3,110.04
November	13, 1947	213532	4,954.62
December	3, 1947	228333	2,972.05
"	17, 1947	240429	1,716.56
Total for 1947			\$57,094.73

"Exhibit A" Page 7

	Voucher Date	Voucher Number	Voucher Amount
January	9, 1948	255210	\$ 3,385.77
"	20, 1948	265191	48.25
"	31, 1948	277604	2,412.03
"	31, 1948	277919	542.68
February	19, 1948	292462	50.83
"	24, 1948	296070	2,857.43
"	25, 1948	297696	1,307.99
March	11, 1948	310798	48.50
"	16, 1948	315192	3,683.72
"	26, 1948	326533	1,588.18
April	2, 1948	332555	2,450.17
"	20, 1948	350889	110.71
"	22, 1948	353690	1,887.99
"	30, 1948	362702	3,437.93
May	14, 1948	377587	2,656.58
"	19, 1948	382936	1,538.73
"	28, 1948	391746	2,180.92
June	16, 1948	406683	2,446.29
"	16, 1948	407092	66.85
July	1, 1948	419197	3,865.50
"	7, 1948	423020	2,880.70
"	13, 1948	430117	93.91
"	14, 1948	431002	1,376.88
"	26, 1948	439558	1,020.14
"	30, 1948	444613	568.43
August	13, 1948	455631	6,343.26
September	10, 1948	483662	4,219.64
"	29, 1948	501944	3,966.08
October	7, 1948	511662	1,159.39
"	8, 1948	512032	82.93
"	19, 1948	520827	2,761.18
"	27, 1948	529560	2,314.63
November	4, 1948	535863	2,971.27
"	17, 1948	550185	2,388.48
"	23, 1948	555668	4,061.47
December	3, 1948	565064	3,080.75
"	9, 1948	570821	2,686.16
"	23, 1948	584953	6,361.22
Total for 1948			\$84,903.57

"Exhibit A" Page 8

	Voucher Date	Voucher Number	Voucher Amount
January	7, 1949	597656	\$ 4,493.38
"	19, 1949	604314	94.28
"	28, 1949	612200	6,793.59
February	17, 1949	627490	90.87
"	24, 1949	634769	4,557.66
March	10, 1949	647764	3,849.67
"	17, 1949	649277	92.45
"	25, 1949	662307	4,864.96
April	14, 1949	681632	208.44
"	20, 1949	686261	6,341.95
"	22, 1949	689911	19.91
May	4, 1949	700103	1,301.38
"	17, 1949	711565	97.07
"	20, 1949	716666	7,041.32
"	31, 1949	723277	931.24
June	17, 1949	739557	9,433.85
"	17, 1949	740072	9.51
July	13, 1949	758856	118.50
"	15, 1949	763296	6,876.55
"	21, 1949	767484	4,165.32
August	3, 1949	776955	5,509.33
"	12, 1949	785590	4,406.77
"	16, 1949	787861	86.52
September	1, 1949	802559	3,790.75
"	9, 1949	811048	2,453.62
"	19, 1949	817268	5,241.76
"	30, 1949	828902	330.51
October	7, 1949	837395	913.39
"	18, 1949	844765	5,374.54
November	4, 1949	862672	5,314.44
"	17, 1949	873355	119.00
December	1, 1949	885884	7,335.61
"	8, 1949	891616	111.56
"	13, 1949	895709	298.81
"	29, 1949	908470	5,944.83
"	30, 1949	909439	1,720.77
Total for 1949			\$110,334.11

"Exhibit A" Page 9

Voucher Date	Voucher Number	Voucher Amount
January 13, 1950	918638	\$ 93.17
" 23, 1950	925266	4,250.54
" 31, 1950	934245	1,355.18
February 16, 1950	946049	1,636.23
" 22, 1950	950470	4,260.54
March 9, 1950	963752	1,334.37
" 14, 1950	967649	74.78
" 17, 1950	970948	1,702.52
" 24, 1950	977569	4,749.77
April 6, 1950	987355	2,421.03
" 13, 1950	993232	104.29
" 21, 1950	101431	3,518.33
May 8, 1950	113645	2,896.62
" 16, 1950	121013	121.55
" 18, 1950	123669	4,635.46
" 29, 1950	130978	1,483.09
June 7, 1950	136809	1,611.67
" 15, 1950	143036	3,550.60
" 22, 1950	148275	77.35
July 6, 1950	159668	2,305.11
" 14, 1950	168166	2,924.37
" 26, 1950	174301	678.82
August 10, 1950	184890	3,921.31
" 24, 1950	194422	925.16
September 8, 1950	206655	4,357.09
" 18, 1950	212211	84.80
" 29, 1950	221163	1,633.87
October 6, 1950	227910	4,298.98
" 18, 1950	237626	175.36
" 26, 1950	249912	3,233.41
November 3, 1950	253997	3,311.02
" 10, 1950	258782	158.87
" 15, 1950	262250	1,915.89
" 24, 1950	268825	1,578.37
December 1, 1950	274832	4,238.26
" 14, 1950	283158	3,942.96
" 22, 1950	289841	127.18
" 29, 1950	294093	71.10
" 29, 1950	294575	5,201.38
Total for 1950		\$84,960.40

"Exhibit A" Page 10

	Voucher Date	Voucher Number	Voucher Amount
January	25, 1951	314779	\$ 5,068.65
"	31, 1951	319921	954.25
February	15, 1951	329202	928.79
"	23, 1951	336045	2,408.12
March	7, 1951	345152	1,241.92
"	12, 1951	349173	147.88
"	16, 1951	354374	136.32
"	22, 1951	358665	4,661.15
"	29, 1951	364559	62.80
April	17, 1951	381111	5,340.05
"	20, 1951	385337	1,460.48
"	27, 1951	392016	1,806.31
May	9, 1951	402231	2,257.03
"	18, 1951	411516	1,430.22
"	25, 1951	418526	3,361.38
June	11, 1951	431053	106.79
"	18, 1951	438163	5,107.20
"	25, 1951	443378	1,926.76
"	29, 1951	448239	90.31
July	2, 1951	449619	1,686.44
"	13, 1951	461937	2,750.74
"	16, 1951	465033	175.11
"	26, 1951	470947	921.89
August	2, 1951	476961	1,587.43
"	9, 1951	482100	3,706.53
"	21, 1951	491417	206.23
"	22, 1951	493158	3.00
September	5, 1951	505172	5,630.79
"	18, 1951	513444	2,909.81
"	24, 1951	519008	17.69
October	8, 1951	531797	5,908.38
"	29, 1951	554199	4,293.45
November	1, 1951	557753	963.14
"	5, 1951	560193	1,666.94
"	20, 1951	574233	1,338.24
"	29, 1951	581879	1,634.74
Total for 1951			\$73,896.96

EXHIBIT B

Summary of Payments Covering Billings
by Barnard-Quinn Co.
for the Period

September 26, 1949, Through November 30, 1951

Voucher Date	Voucher Number	Voucher Amount
October 18, 1949	844264	\$ 859.88
November 4, 1949	862460	1,244.20
December 13, 1949	895410	1,067.21
January 9, 1950	914295	885.64
February 22, 1950	950161	627.63
March 9, 1950	963784	964.97
April 6, 1950	987389	1,690.91
“ 21, 1950	101508	1,353.91
May 4, 1950	110869	882.75
“ 9, 1950	114174	750.98
“ 29, 1950	131113	851.69
June 15, 1950	143309	986.13
“ 29, 1950	155091	767.77
July 14, 1950	168191	887.32
August 10, 1950	185064	1,242.38
“ 24, 1950	194438	459.28
September 19, 1950	212653	1,479.55
October 18, 1950	237867	1,903.48
November 3, 1950	253768	1,468.91
“ 15, 1950	262162	304.57
December 1, 1950	274863	1,706.53
“ 11, 1950	280281	626.98
“ 29, 1950	294383	402.01
January 31, 1951	319510	1,178.06
“ 12, 1951	302568	666.40
February 23, 1951	335818	1,751.63
March 7, 1951	345308	1,163.55
“ 29, 1951	364508	3,695.27
April 20, 1951	385157	2,759.68
“ 27, 1951	392210	1,538.85
May 25, 1951	418461	3,458.60
June 18, 1951	437912	2,381.79
“ 25, 1951	443218	1,754.85

Voucher Date	Voucher Number	Voucher Amount
July 13, 1951	462008	2,684.18
August 9, 1951	482052	2,449.75
September 10, 1951	508115	2,559.51
October 8, 1951	531812	2,716.65
November 1, 1951	557568	2,201.50
" 20, 1951	574166	483.86
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Total		\$56,858.81
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Receipt of copy acknowledged.

[Endorsed]: Filed August 21, 1953.

[Title of District Court and Cause.]

ANSWER OF FRANK R. BLADE
TO AMENDED COMPLAINT

Defendant Frank R. Blade, for answer to the Amended Complaint for Damages for Fraud, alleges:

I.

Answering defendant denies each and every allegation contained in paragraph II of the amended complaint.

II.

Answering defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph III of the amended complaint with respect to defendants other than this answering defendant.

III.

Answering defendant is without knowledge or information sufficient to form a belief as to the truth

of the allegations contained in paragraph IV of the amended complaint with respect [27] to defendants other than this answering defendant.

Answering defendant admits that he is a citizen of the State of California and a resident within the Southern District of California.

IV.

Answering defendant denies each and every allegation contained in paragraph V of the amended complaint except that answering defendant admits that for many years, including all times mentioned in said amended complaint except the period from June 12, 1942, to August 1, 1943, both inclusive, he was employed by plaintiff with the title of advertising manager of the Los Angeles group of stores owned and operated by plaintiff, and that he undertook as a part of his duties to faithfully serve the interests of plaintiff within the scope of his employment.

V.

Answering paragraph VI of the amended complaint, this answering defendant admits that, as an employee of the Los Angeles group of stores owned and operated by plaintiff, at the request of and under instructions from plaintiff, he, from time to time, sent art work to "Engravers" for the preparation of engravings to be used in connection with newspaper and other advertising of the plaintiff's commodities in the Los Angeles area.

Answering defendant denies each and every other allegation contained in paragraph VI of the

amended complaint except as hereinafter admitted or alleged.

VI.

Answering paragraph VII of the amended complaint, this answering defendant admits that prior to October 1, 1949, he was instructed by plaintiff to send art work to "Barnard Company" and thereafter did send art work to "Barnard Company" for the preparation of engravings to be used in connection with newspaper and other advertising of the plaintiff's commodities in the Los Angeles area.

Answering defendant denies each and every other allegation contained in paragraph VII of the amended complaint except as hereinafter admitted or alleged. [28]

VII.

Answering defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph VIII of the amended complaint with respect to defendants other than the answering defendant.

Answering defendant denies each and every other allegation contained in paragraph VIII of the amended complaint except as herein otherwise admitted or alleged.

VIII.

Answering defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph IX of the amended complaint with respect to defendants other than this defendant.

Answering defendant denies each and every other allegation contained in paragraph IX of the amended complaint except as herein otherwise admitted or alleged.

IX.

Answering defendant denies each and every allegation contained in paragraph X of the amended complaint except as herein otherwise admitted or alleged.

X.

Answering defendant denies, on information and belief, each and every allegation contained in paragraph XI of the amended complaint except that this answering defendant admits that on the 10th day of December, 1951, representatives of the plaintiff inquired of him concerning a check in the amount of \$400.00 which he had received from defendant Metropolitan Mat Service and this answering defendant informed representatives of plaintiff that he had, from time to time, received sums of money from defendants Metropolitan Mat Service, Metropolitan Engravers, Ltd., and Barnard Engraving Company, but this answering defendant alleges that said sums were paid to and received [29] by this answering defendant for reasons and purposes other than those set forth in the amended complaint and were and are known to the plaintiff herein to be in amounts different from those set forth in the amended complaint.

XI.

Answering defendant denies each and every al-

legation contained in paragraph XII of the amended complaint.

Further Answering the Amended Complaint
Herein, Answering Defendant Alleges:

I.

That from time to time, answering defendant received sums of money from Metropolitan Mat Service, Inc.; Metropolitan Engravers, Ltd., and Barnard Engraving Company, Inc., but that said sums were paid to and received by this answering defendant for reasons and purposes other than those set forth in the amended complaint and were in amounts different from those set forth in the amended complaint, and that the exact amounts received by this answering defendant are well known to plaintiff.

For a Further and Second Additional Defense to the Amended Complaint Herein, Answering Defendant Alleges:

I.

That the amended complaint fails to state a claim against the answering defendant upon which relief can be granted.

For a Further and Third Additional Defense to the Amended Complaint Herein, Answering Defendant Alleges:

I.

That all claims of the plaintiff which are based upon acts which are alleged to have been committed by this answering defendant at any time prior to

May 2, 1949, are barred by the [30] provisions of Subsection 1, of Section 339 of the Code of Civil Procedure of the State of California.

For a Further and Fourth Additional Defense to the Amended Complaint Herein, Answering Defendant Alleges:

I.

All claims of plaintiff which are based upon acts which are alleged to have been committed by this answering defendant at any time prior to May 2, 1948, are barred by the provisions of Section 338 of the Code of Civil Procedure.

For a Further and Fifth Additional Defense to the Amended Complaint Herein, Answering Defendant Alleges:

I.

Answering defendant alleges that the rights of action, if any, set forth in the amended complaint in respect to equitable relief sought by plaintiff are barred by laches on the part of the plaintiff.

For a Further and Sixth Additional Defense to the Amended Complaint Herein, Answering Defendant Alleges:

I.

That prior to the filing of the amended complaint herein on August 21, 1953, and prior to the filing of the original complaint herein, on May 2, 1952, and to wit, on December 10, 1951, the plaintiff herein filed a complaint designated "Complaint (For

Money Had and Received)" in the Superior Court of the State of California, in and for the County of Los Angeles, in a proceeding entitled "Sears, Roebuck & Co., a New York corporation, Plaintiff, vs. Frank R. Blade and Nella Blade, Defendants, No. 593,463, of the records of the Clerk of said court, which said action will hereinafter sometimes be referred to as "Superior Court action," by virtue of which the plaintiff seeks to recover from said defendants the sum of \$75,000.00 for moneys allegedly received by the defendants before December 1, 1951, for the use of the plaintiff, and on said December 10, 1951, plaintiff caused a summons to be issued in said action; that a copy of said complaint is hereunto attached marked Exhibit "A," and by this reference thereto incorporated herein and made a part hereof; that the defendant Frank R. Blade named in said complaint is the same person as this answering defendant.

II.

That Subsection I of Section 537 of the Code of Civil Procedure of the State of California provides as follows:

When and actions in which attachment may issue. The plaintiff, at the time of issuing the summons, or at any time afterward, may have the property of the defendant attached, as security for the satisfaction of any judgment that may be recovered, unless the defendant gives security to pay such judgment, as in this chapter provided, in the following cases:

1. (Unsecured claims on contract.) In an action upon a contract, express or implied, for the direct payment of money, where the contract is made or is payable in this State, and is not secured by any mortgage, deed of trust or lien upon real or personal property, or any pledge of personal property, or, if originally so secured, such security has, without any act of the plaintiff, or the person to whom the security was given, become valueless; provided, that an action upon any liability, existing under the laws of this State, of a spouse, relative or kindred, [32] for the support, maintenance, care or necessaries furnished to the other spouse, or other relatives or kindred, shall be deemed to be an action upon an implied contract within the term as used throughout all subdivisions of this section.

III.

That at the time the summons was issued in said Superior Court action, as above set forth, the plaintiff caused to be filed therein an Affidavit for Attachment Against Resident, a copy of which is hereunto attached, marked Exhibit "B," and by this reference thereto incorporated herein and made a part hereof.

IV.

That at the time the summons was issued in said Superior Court action as above set forth, the plaintiff caused to be filed therein a Statement to Clerk on Attachment, a copy of which is hereunto attached marked Exhibit "C," and by this reference thereto incorporated herein and made a part thereof.

V.

That at the time the summons was issued in said Superior Court action as above set forth, the plaintiff caused to be issued therein a Writ of Attachment, a copy of which is hereunto attached, marked Exhibit "D" and by this reference thereto incorporated herein and made a part hereof, and caused said attachment to be levied upon property belonging to this answering defendant.

VI.

That thereafter and pursuant to a demand for Bill of Particulars, the plaintiff in said action, Sears, Roebuck & Co., a New York corporation, which is also the plaintiff herein, filed a Bill of Particulars in said Superior Court action, a copy of which is hereunto attached, marked Exhibit "E," and [33] by this reference thereto incorporated herein the same as though fully set forth herein at length.

VII.

That said Bill of Particulars, annexed hereto as Exhibit "E" and incorporated herein, discloses that said Superior Court action is for the same alleged wrong for which the plaintiff seeks to recover by the amended complaint on file herein.

VIII.

That said Superior Court action is now pending in the Superior Court of the State of California, in and for the County of Los Angeles, and the attachment issued in said action and levied upon the prop-

erty belonging to this answering defendant, at all times during the pendency of said Superior Court action, has been and now is in full force and effect against the property of this answering defendant.

IX.

That by the filing of said Superior Court action, the plaintiff herein treated its claims and rights of action, if any, for the wrongs alleged to have been committed in the amended complaint on file herein as claims and rights of actions arising under a contract implied by law and elected a remedy under which it was entitled to and did invoke a provisional remedy afforded by the laws of the State of California in such cases, to wit, the provisional remedy of attachment, to which it would not have otherwise been entitled.

That by virtue of such election and attachment the plaintiff is barred and estopped from maintaining this action.

Wherefore, this answering defendant prays that plaintiff take nothing by its action, and that he may have judgment against plaintiff for his costs.

GERALD R. KNUDSON,
TOBIAS G. KLINGER, and
GERALD R. KNUDSON, JR.,

By /s/ GERALD R. KNUDSON.

Duly verified. [34]

EXHIBIT A

In the Superior Court of the State of California
in and for the County of Los Angeles

Civil No. 593643

SEARS, ROEBUCK AND CO., a New York Cor-
poration,

Plaintiff,

vs.

FRANK R. BLADE and NELLA BLADE,

Defendants.

COMPLAINT
(For Money Had and Received)

Plaintiff for its cause of action alleges:

I.

That at all times herein mentioned, plaintiff was and now is a corporation organized and existing under and by virtue of the laws of the State of New York, duly authorized to do business in the State of California.

II.

That at all times herein mentioned, defendants were and now are residents of the County of Los Angeles, State of California.

III.

That on the 1st day of December, 1951, the defendants were indebted to plaintiff in the sum of Seventy-five Thousand Dollars (\$75,000.00), for

moneys before that time received by defendants for the use of plaintiff and being so indebted to defendants, in consideration thereof, then and there promised the [36] plaintiff to pay to it the said sum of money on request.

IV.

That the defendants, though requested, have not paid the said sum of Seventy-five Thousand Dollars (\$75,000.00), or any part thereof to the plaintiff, but refuse to do so.

Wherefore, plaintiff prays judgment against the defendants in the sum of Seventy-five Thousand Dollars (\$75,000.00), together with interest thereon from the 1st day of December, 1951, for the costs of this action and for such other and further relief as may by the court be deemed just and proper.

/s/ JOHN L. WHEELER,
Attorney for Plaintiff.

Duly verified. [37]

EXHIBIT B

In the Superior Court of the State of California
in and for the County of Los Angeles

Civil No. 593643

SEARS, ROEBUCK AND CO., a New York Cor-
poration,

Plaintiff,

vs.

FRANK R. BLADE and NELLA BLADE,

Defendants.

AFFIDAVIT FOR ATTACHMENT
AGAINST RESIDENT—SECTION 538

State of California,
County of Los Angeles—ss.

Russell G. Curry being sworn, says:

I am the Assistant Secretary of Sears, Roebuck and Co., Plaintiff herein; that the Defendants herein are indebted to plaintiff, Sears, Roebuck and Co., a New York corporation, in the sum of Seventy-five Thousand (\$75,000.00) Dollars, of the United States, besides interest at the rate of 6 per cent per annum from the 1st day of December, 1951, over and above all legal setoffs, and counter-claims, upon an implied contract, for the direct payment of money, to wit: said defendants are indebted to plaintiff in the sum of \$75,000.00 for moneys had and received by the defendants for the use and benefit of the plaintiff at the agreed sum of \$75,000.00 and costs of suit, and that such contract was made or is payable in this

state, and that the payment of the same has not been secured by any mortgage, deed of trust, or lien upon real estate or personal property, or any pledge of personal [39] property.

That the attachment is not sought, and the action is not prosecuted to hinder, delay or defraud any creditor or creditors of the said defendant, or any creditor or creditors of any or either of said defendants.

R. G. CURRY.

Subscribed and sworn to before me this 4th day of December, 1951.

FLORENCE A. LaBELLE,
My commission expires Feb. 1, 1952. [40]

EXHIBIT C

In the Superior Court of the State of California
in and for the County of Los Angeles
Civil No. 593643

SEARS, ROEBUCK AND CO., a New York Corporation,

Plaintiff,

vs.

FRANK R. BLADE and NELLA BLADE,
Defendants.

STATEMENT TO CLERK ON ATTACHMENT
Harold J. Ostly, County Clerk:

Whereas, the plaintiff has commenced, or is about

to commence an action in the Superior Court of the County of Los Angeles, against the defendants upon an implied contract for the direct payment of money, claiming that there is due to the plaintiff from the defendants the sum of Seventy-five Thousand Dollars; and having filed an affidavit for, and a bond on, attachment, requests that a Writ of Attachment issue herein directed to the Sheriff of the County of Los Angeles, State of California. It is the intention of Plaintiff to instruct the Sheriff to levy writ upon the following described property belonging to defendants to wit: Bank Accounts in the names of Frank R. Blade and/or Nella Blade and the personal property in the safe deposit box in the names of Frank R. Blade and/or Nella Blade located in the Soto-Hostetter Branch of the Bank of America NT&SA, Los Angeles, California, and that a bond of \$11,000.00 will give defendants ample protection against an abuse of this process.

Dated 4th day of December, 1951.

JOHN L. WHEELER,

Attorney for Plaintiff. [41]

EXHIBIT D

In the Superior Court of the State of California in .
and for the County of Los Angeles

No. 593643

SEARS, ROEBUCK AND CO., a New York Cor-
poration,

Plaintiff,

vs.

FRANK R. BLADE and NELLA BLADE,

Defendants.

WRIT OF ATTACHMENT

The People of the State of California Send Greet-
ings to :

The Sheriff, Marshal, or Constable of the County
of Los Angeles.

Whereas, the above-entitled action was com-
menced by Plaintiff in the Superior Court of the
County of Los Angeles to recover from the De-
fendants Frank R. Blade and Nella Blade the sum
of Seventy-Five Thousand (\$75,000.00) Dollars, of
the United States, besides interest at the rate of 6
per cent per annum from the first day of December,
1951, being moneys had and received by the defen-
dants for the use and benefit of the plaintiff on an
implied contract to repay, and costs of suit; and an
affidavit for, and undertaking on, attachment, have
been filed as requested by law.

Now, you are commanded to attach and safely keep all property of such Defendants Frank R. Blade and Nella Blade within your County, not exempt from execution, or so much thereof as may be sufficient to satisfy the Plaintiff's demand against such Defendants [42] unless such Defendants give you security, by the undertaking of at least two sufficient sureties, which first must be approved by a Judge of the Superior Court of this County or by a Judge of the Superior Court of the county where the levy shall have been made or is about to be made, or deposit a sum of money with you in an amount sufficient to satisfy such demand against such Defendants, besides costs, or in an amount equal to the value of the property of such Defendants, which has been or is about to be attached; in which case you will take such undertaking or sum of money, and hereof make service and return.

Witness the Honorable and Presiding Judge of the Superior Court, attested by my hand and seal of said Court this .. day of December, 1951.

December 10, 1951.

HAROLD J. OSTLY,
County Clerk and Clerk of the Superior Court of
the State of California, in and for the County
of Los Angeles.

[Seal]

By K. MEACHER,
Deputy. [43]

EXHIBIT E

In the Superior Court of the State of California in
and for the County of Los Angeles

No. 593,643

SEARS, ROEBUCK AND CO., a New York Cor-
poration,

Plaintiff,

vs.

FRANK R. BLADE and NELLA BLADE,

Defendants.

BILL OF PARTICULARS

In answer to the demands of defendants for a bill of particulars in the above-entitled action, the plaintiff states the particulars of its claim as follows:

Secret profits received by Defendant Frank R. Blade for and on account of Sears, Roebuck and Co., but not accounted for or paid over to said company as follows:

(a) Sums amounting to Four Hundred Dollars (\$400.00) per month received by Frank R. Blade from January, 1937, to October, 1951, inclusive, a period of one hundred sixty-six months, from Metropolitan Engravers, Ltd., a corporation, and Metropolitan Mat Service, Inc., amounting to Sixty-Six Thousand, Four Hundred Dollars (\$66,400.00).

(b) Sums received from Barnard Engraving Company (formerly known as Barnard-Quinn Co.)

during the period from September, 1949, to and including November 1, 1951, amounting to [44] Eight Thousand, Five Hundred Eleven and 50/100 Dollars (\$8,511.50).

(c) Sums received from East Los Angeles Tribune and Gazette, Fleetwood Publishing Co., and Southern California Publishing Company, in the period between June 26, 1951, and October 3, 1951, amounting to Six Hundred Fifty-Seven and 64/100 Dollars (\$657.64); making a total of Seventy-Five Thousand, Five Hundred Sixty-Nine and 14/100 Dollars (\$75,569.14).

The above amounts were received by said Frank R. Blade for the account of plaintiff but were not reported to plaintiff or accounted for by said Blade, and plaintiff did not ascertain that said sums had been paid to and received by said Blade until the month of December, 1951. Plaintiff is making audits of the accounts of Frank R. Blade and Nella Blade and the several companies above named. The above statement is the presently provable amount of profits received by said Frank R. Blade, portions of which have been traced into stocks and bonds now standing in the names of said defendants, and in bank accounts (check and savings), which stand in the names of said defendants, and one of which is in the name of the defendant Nella Blade. Present research indicates that the above amounts will be substantially increased as present evidence now being obtained is analyzed, and plaintiff will at the appropriate time seek to amend its complaint to

allege such further and additional amounts as may ultimately appear to be owing.

Dated: This 10th day of January, 1952.

SEARS, ROEBUCK AND CO., a
Corporation,

By /s/ R. G. CURRY,
Assistant Secretary.

Duly verified.

Affidavit of Service by Mail attached.

[Endorsed]: Filed December 2, 1953. [45]

[Title of District Court and Cause.]

NOTICE OF MOTION

To John L. Wheeler, Freston & Files and Eugene D. Williams, Attorneys for the Plaintiff:

You and Each of You will Please Take Notice that the undersigned will bring on for hearing, on Monday, the 29th day of March, 1954, at 10:00 a.m., or as soon thereafter as counsel can be heard, before the above-entitled court, in the courtroom of the Honorable Peirson M. Hall, judge thereof, located in the Post Office Building, Los Angeles, California, a motion to dismiss or for summary judgment, in behalf of the defendants Metropolitan Engravers, Ltd.; Metropolitan Mat [48] Service, Inc.; Gregory F. Duffy, Aubrey A. Duffy, Alfred Smutz, and Walter C. Duffy.

Copies of the foregoing motion in writing, the affidavit of William J. Clark, and the points and authorities in support thereof, are being served and filed concurrently with the service and filing of this notice of motion.

Said motion will be made on the ground set out in the written motion and will be based on this notice, the memoranda of authorities, the affidavit of William J. Clark, and all papers, records, pleadings and files in this action.

Dated: March 9, 1954.

/s/ NATHAN M. DICKER,
Attorney for Defendants
Above Named.

[Endorsed]: Filed March 12, 1954. [49]

[Title of District Court and Cause.]

MOTION TO DISMISS OR FOR SUMMARY JUDGMENT

The Defendants Metropolitan Engravers, Ltd.; Metropolitan Mat Service, Inc.; Gregory F. Duffy, Aubrey A. Duffy, Alfred Smutz and Walter C. Duffy move the Court as follows:

1. To dismiss the action because the amended complaint fails to state a claim against any defendant upon which relief can be granted; or,
2. In the alternative, to grant defendants a sum-

mary judgment, upon the ground that there is no genuine issue as to any material fact and that defendants are entitled to a judgment as a matter of law. [50]

3. Said motion to dismiss will be made upon the additional grounds that it appears affirmatively upon the face of the amended complaint that plaintiff's cause of action is barred by the provisions of subdivision (1) of section 338 of the Code of Civil Procedure; and it further appears upon the face of the amended complaint that plaintiff has been so lacking in diligence in prosecuting its claim as to bar it from relief.

4. That said motion to dismiss will be made upon the additional ground that plaintiffs have failed to set forth each contract sued upon in a separate count, and that a separate statement of each contract is necessary to enable defendants to set up the defenses which they have.

5. Said motion for summary judgment will be made upon all of the grounds hereinabove stated and upon additional grounds that upon a state of facts which cannot be and is not disputed, defendants are entitled to judgment as a matter of law.

6. Both of said motions will be made upon the additional grounds that heretofore on December 10, 1951, the plaintiff herein filed a complaint for money had and received, in which complaint Frank R. Blade and Nella Blade were named as defendants; that there was filed in said action on or about

the 10th day of December, 1951, an affidavit for attachment against said defendants signed by R. G. Curry (Russell G. Curry), who stated therein that he was an assistant secretary of plaintiff. That there was also filed on or about the same date a statement to the Clerk on attachment signed by John L. Wheeler, who is the attorney for plaintiff. That thereupon a writ of attachment was issued in said action and property levied upon belonging to said defendants. That in response to a demand for bill of particulars the plaintiff filed in said action its bill of particulars. [51]

It specified as a part of plaintiff's demand sums amounting to \$400.00 per month received by Frank R. Blade during a period of 165 months and paid by Metropolitan Engravers, Ltd., and Metropolitan Mat Service, Inc., and also sums received from Barnard Engraving Co., from September 19, 1949, to November 1, 1951, amounted to \$8,550.00. That by filing said complaint and procuring the issuance of said writ of attachment the plaintiff herein treated its claims and rights of action as arising under a contract implied by law and elected a remedy by way of contract implied by law arising out of the alleged wrong here claimed and inconsistent with the claim asserted herein. That by so doing the plaintiff elected to and did waive its right to damages for fraud or wrong and elected in lieu thereof to pursue its remedy upon an implied contract and to avail itself of the provisional remedy of attachment to which it would not have been enti-

tled if it had elected to sue for damage; that by reason of said election the plaintiff is estopped from maintaining this action and the said motion to dismiss and said motion for summary judgment will be made upon this notice, the memorandum of authorities, and the affidavits attached hereto.

The said motion to dismiss and also the said motion for summary judgment will be made upon the additional ground that by reason of the lapse of time, the death of witnesses, and the natural failure of memory and loss of evidence, that it is impossible for defendants to establish their defense as they could have done if the said action had been brought with reasonable diligence, and that by reason of the plaintiff's laches and lack of diligence material evidence which otherwise would be available is irreversibly lost to defendants as is more fully made to appear by the affidavit of Aubrey Duffey heretofore filed and to which reference is hereby made.

/s/ NATHAN M. DICKER,
Attorney for Defendants Metropolitan Engravers,
Ltd.; Metropolitan Mat Service, Inc., et al.

[Endorsed]: Filed March 12, 1954. [52]

[Title of District Court and Cause.]

AFFIDAVIT OF WM. J. CLARK

State of California,
County of Los Angeles—ss.

William J. Clark, being first duly sworn, deposes and says:

I am an attorney at law, duly licensed as such under the law of the State of California, and am now and for a long time past have been so engaged in the County of Los Angeles, State of California.

There is pending in the Superior Court of the State of California in and for the County of Los Angeles, a certain action [53] wherein, Sears, Roebuck & Co., a New York corporation, is plaintiff and Frank R. Blade and Nella Blade are defendants, the action bearing Civil Number 593,643.

Said action is for money had and received. It was commenced by filing the complaint on December 10, 1951, and there was filed in said action an affidavit for attachment sworn to by Russell G. Curry on the 4th day of December, 1951, the name Russell G. Curry being written out in the body of the affidavit, and the signature being R. G. Curry.

There was also filed in said action a statement to the Clerk on attachment which was dated the 4th day of December, 1951, and signed by John L. Wheeler, attorney for plaintiff, the said John L. Wheeler being one of the attorneys for the plaintiff herein.

There was issued a writ of attachment in said action and levy was made thereunder. The said writ has never been discharged and the said action is now pending.

There was a demand for a bill of particulars served and filed by the defendants in said action, and a bill of particulars dated the 10th day of January, 1952, is in the files in said action. The plaintiff therein stated the particulars of his claim as including "sums amounting to \$400.00 per month received by Frank R. Blade from January, 1937, to October, 1951, inclusive, a period of 166 months, from Metropolitan Engravers, Ltd., a corporation, and Metropolitan Mat Service, Inc., amounting to \$66,400.00," and "sums received from Barnard Engraving Company, Inc. (formerly known as Barnard-Quinn Company), during the period from September, 1949, to and including November 1, 1951, amounting to \$8,511.50."

I have compared the original of the papers herein mentioned with copies attached to a copy of the answer of Frank R. Blade to the amended complaint herein, and I have found that the copies so attached to said answer are true and correct copies of the [54] originals contained in the file of said action, which said file is in the office of the County Clerk of the County of Los Angeles, State of California.

In an affidavit in said file resisting a motion for summary judgment R. G. Curry swore that of his

own knowledge and from information gained from Frank R. Blade and inspection and analysis of plaintiff's accounts that Blade was paid for a period from January, 1937, to October, 1951; that Blade was paid secret profits by these defendants in monthly sums amounting to \$66,400.00; alleges on information and belief that he has received from the corporations named, including defendant corporation, additional sums, the exact amount of which is unknown to affiant.

Dated this 17th day of February, 1954.

/s/ WM. J. CLARK.

Subscribed and Sworn to before me this 17th day of February, 1954.

[Seal] /s/ VERONA TAFT,
Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed March 12, 1954. [55]

[Title of District Court and Cause.]

NOTICE OF MOTION FOR MORE
DEFINITE STATEMENT

To John L. Wheeler, Freston & Files and Eugene D. Williams, Attorneys for the Plaintiff:

You and Each of You Will Please Take Notice that the undersigned will bring on for hearing, on Monday, the 29th day of March, 1954, at 10:00 a.m.,

or as soon thereafter as counsel can be heard, before the above-entitled court, in the courtroom of the Honorable Peirson M. Hall, judge thereof, located in the Post Office Building, Los Angeles, California, a motion for a more definite statement of plaintiff's claim, in behalf of the defendants Metropolitan Engravers, Ltd.; Metropolitan Mat Service, Inc.; Gregory F. Duffy, Aubrey A. Duffy, Alfred [76] Smutz, and Walter C. Duffy.

Copies of the foregoing motion in writing and the points and authorities in support thereof, together with copy of this notice, are being served and filed concurrently with the filing of this notice of motion.

Said motion for a more definite statement will be made on the grounds set out in said motion and will be based on this notice, the memorandum of authorities attached hereto, and all papers, records, pleadings and files in this action.

Dated: March 9, 1954.

/s/ NATHAN M. DICKER,
Attorney for Defendants
Above Named.

[Endorsed]: Filed March 12, 1954. [77]

[Title of District Court and Cause.]

MOTION FOR MORE DEFINITE STATEMENT OF CLAIM

The defendants Metropolitan Engravers, Ltd.; Metropolitan Mat Service, Inc.; Gregory F. Duffy, Aubrey A. Duffy, Alfred Smutz, and Walter C. Duffy, move for a more definite statement of plaintiff's claim.

In paragraph VIII (page 5, lines 28, 31) of plaintiff's amended complaint, plaintiff alleges that from January 1, 1937, until on or about the 10th day of December, 1951, the agreements and conspiracies set forth in paragraphs V and VI thereof were carried out and executed by the defendants, but except for the allegations of payments made by defendant Engravers, it cannot be ascertained what acts or things were done in carrying out said conspiracy or [78] who the parties were who did each specific act.

They point out in paragraph IV of plaintiff's amended complaint that "all of the acts of defendant 'Mat Service' herein complained of were performed by it as agent and representative of defendant 'Engravers,'" but it cannot be ascertained from said amended complaint what acts or things were done by defendant Mat Service or that any acts or things were done by it other than that it conspired with defendant Engravers to pay Frank R. Blade rebates, profits or commissions. It is alleged that the officers and agents of defendant Mat Company were also the officers and agents of defendant Engravers, and it is also alleged that in

its business operation it is also alleged that in its business operation it is controlled by defendant Engravers.

These defendants do not understand how, if at all times the two corporations had the same officers and directors, the said officers and directors could conspire with themselves as principal for one company and agent for the other. Nor can it be understood by these defendants who the officers and agents of defendant Mat Company are who are alleged so to have conspired, and therefore defendants have no means of knowing whether they be dead or alive, it appearing from the affidavit of Mr. Aubrey Duffy, now on file herein, that two such officers are now dead.

If, as alleged in paragraph VI of said amended complaint, the officers, agents and representatives of defendant Engravers conspired to pay Blade rebates, profits or commissions, we cannot ascertain from said amended complaint which of the said corporations was to pay said sum, or whether the payments were to be divided between the two corporations; nor can it be ascertained that the said persons in so conspiring were acting within the scope of their authority as officers [79] of Engravers, or that they were acting within the scope of their authority as officers of defendant Mat Service.

/s/ NATHAN M. DICKER,
Attorney for Said Defendants.

[Endorsed]: Filed March 12, 1954. [80]

[Title of District Court and Cause.]

NOTICE OF MOTION TO DISMISS

To the Above-Named Plaintiff, and to John L. Wheeler, Freston & Files, Eugene D. Williams, Esquires, Attorneys for Said Plaintiff:

You and Each of You Will Please Take Notice:

That the defendant Metropolitan Mat Service, Inc., for itself, and not for any of its co-defendants, will on the 29th day of March, 1954, at 10:00 o'clock a.m., of said day, or as soon thereafter as counsel can be heard, at the courtroom of Hon. Peirson M. Hall, Judge of said District Court, move the court to dismiss the above-entitled action as to this defendant.

The said motion will be made upon the grounds and for the reason that the plaintiff's amended complaint does not state [86] facts sufficient to constitute a claim against this defendant, and that said amended complaint does not state a claim showing that plaintiff is entitled to any relief as to this defendant.

Said motion to dismiss will be made upon this notice, the memorandum of authorities attached hereto, and the papers, pleadings, files and records in this action.

/s/ NATHAN M. DICKER,
Attorney for Defendant Metropolitan Mat Service,
Inc.

[Endorsed]: Filed March 12, 1954. [87]

[Title of District Court and Cause.]

MOTION TO DISMISS

Comes Now defendant Metropolitan Mat Service, Inc., one of the defendants herein, and moves to dismiss the above-entitled action as to this defendant upon the grounds and for the reasons that plaintiff's amended complaint does not state facts sufficient to constitute a claim against this defendant, and that said amended complaint does not state a claim showing that plaintiff is entitled to any relief as to this defendant.

Dated this 10th day of March, 1954.

/s/ NATHAN M. DICKER,

Attorney for Defendant Metropolitan Mat Service,
Inc.

[Endorsed]: Filed March 12, 1954. [88]

[Title of District Court and Cause.]

NOTICE OF MOTION OF DEFENDANT FRANK R. BLADE FOR SUMMARY JUDGMENT

To Plaintiff, Sears, Roebuck & Co., and John L. Wheeler; Freston & Files and Eugene D. Williams, Its Attorneys:

You, and Each of You, Will Please Take Notice that on the 26th day of April, 1954. at 10 o'clock a.m., or as soon thereafter as counsel can be heard, the defendant, Frank R. Blade, will move the above-entitled Court in the courtroom of Honorable Peirson M. Hall, United States Post Office and Courthouse Building, 312 North Spring Street, Los

Angeles, California, for an order, pursuant to Rule 56 (b) of the Federal Rules of Civil Procedure, granting a summary judgment in favor of defendant Frank R. Blade, dismissing the action as to him, on the ground that there is no genuine issue as to any material fact and that defendant Frank R. Blade is entitled to a judgment as a matter of law, in that, as set forth in this defendant's Sixth Affirmative Defense, plaintiff has heretofore elected to pursue a separate, inconsistent remedy [97] against this defendant and is estopped and precluded from proceeding with this action.

Said motion for summary judgment will be based upon:

(a) The pleadings on file in this action, particularly the Sixth Affirmative Defense set forth in this defendant's Answer to Amended Complaint;

(b) The affidavit of Gerald R. Knudson, Esq., attached hereto as Exhibit A;

(c) The points and authorities filed herewith in support of this motion for summary judgment;

(d) All of the records, papers, and documents now on file in the above-entitled action.

Dated: April 12, 1954

KNUDSON, WOLFE &
KNUDSON,
TOBIAS G. KLINGER,

By /s/ GERALD R. KNUDSON,

By /s/ TOBIAS G. KLINGER,

Attorneys for Defendant,
Frank R. Blade.

[Title of District Court and Cause.]

AFFIDAVIT OF GERALD R. KNUDSON IN
SUPPORT OF MOTION OF DEFENDANT
FRANK R. BLADE FOR SUMMARY
JUDGMENT

State of California,
County of Los Angeles—ss.

Gerald R. Knudson, being first duly sworn, deposes and says:

That affiant is an attorney at law duly admitted to practice in all of the courts of the State of California and before the above-entitled court; that he is one of the attorneys of record in the above-entitled action for the defendant Frank R. Blade; that this affidavit is made on behalf of said defendant in support of his motion for summary judgment.

That prior to the filing of the amended complaint herein, on August 21, 1953, and prior to the filing of the original complaint herein, on May 2, 1952, namely, on December 10, 1951, the plaintiff herein, Sears, Roebuck, and Co., filed a complaint designated [97] “Complaint (For Money Had and Received)” in the Superior Court of the State of California, in and for the County of Los Angeles, in a proceeding entitled “Sears, Roebuck and Co., a New York corporation, Plaintiff, vs. Frank R. Blade and Nella Blade, Defendants”; that said action is number 593463 on the records of the Clerk of said Court; that said action will hereinafter be referred to as the “Superior Court action”; that by virtue of

said Superior Court action, the plaintiff Sears, Roebuck and Co., seeks to recover from said defendants the sum of \$75,000 for moneys allegedly received by said defendants before December 1, 1951, for the use of the plaintiff; that on said December 10, 1951, the plaintiff Sears, Roebuck and Co. caused a summons to be issued in said action; that a copy of the said complaint filed by Sears, Roebuck and Co. in the Superior Court action is attached to the answer filed herein by the defendant Frank R. Blade, and is marked Exhibit A, and by this reference thereto is incorporated in this affidavit and made a part hereof; that the defendant Frank R. Blade named in said complaint and amended complaint in the aforesaid Superior Court action, is the same person as the answering defendant Frank R. Blade in this proceeding in the United States District Court, and on whose behalf the instant motion for summary judgment is filed.

That at the time the summons was issued in said Superior Court action, the plaintiff Sears, Roebuck and Co. caused to be filed therein an *Affidavit for Attachment Against Resident*, a copy of which is attached to the answer of this defendant to the amended complaint, marked Exhibit B, and by this reference is incorporated herein and made a part hereof; that said *Affidavit for Attachment Against Resident* was prepared and sworn to by Russell G. Curry, the Assistant Secretary of plaintiff Sears, Roebuck and Co., and declares that the defendants in said Superior Court action are indebted to Sears,

Roebuck and Co. in the sum of \$75,000 together with interest thereon at the rate of 6% per annum from December 1, 1951, upon an implied contract for the direct payment of money, that the defendants, including this defendant, were indebted to plaintiff in said sum for moneys had and received for the use and benefit of the plaintiff, that such contract was made or is payable in California, and that the payment of said contract was without security.

That at the time the summons was issued in said Superior Court action, the plaintiff Sears, Roebuck and Co. caused to be filed therein a Statement to Clerk on Attachment, a copy of which is attached to the answer of defendant Frank R. Blade herein, to the amended complaint herein, marked Exhibit C, and by this reference incorporated herein and made a part hereof; that said Statement to Clerk on Attachment was prepared and executed by John L. Wheeler, Esq., attorney for plaintiff Sears, Roebuck and Co. in said Superior Court action, and stated among other things, that plaintiff had commenced, or was about to commence an action in the Superior Court of the County of Los Angeles, against the defendants, including this defendant, upon an implied contract for the direct payment of money and claiming that there was due to the plaintiff from said defendants the sum of \$75,000.

That at the time summons was issued in said Superior Court action, the plaintiff Sears, Roebuck and Co. caused to be issued therein a Writ of Attachment, a copy of which is attached to the answer

of defendant Frank R. Blade to the Amended Complaint herein, and by this reference incorporated herein and made a part hereof; that plaintiff Sears, Roebuck and Co. caused said attachment to be levied upon substantial personal property belonging to the defendant Frank R. Blade.

That thereafter, and pursuant to a demand for a Bill of Particulars made by the defendants in said Superior Court action, the plaintiff Sears, Roebuck and Co., which is also the plaintiff in this action, filed a verified Bill of Particulars in said Superior Court action, a copy of which is attached to the answer of defendant Frank R. Blade to the amended complaint herein, marked Exhibit E, and by this reference incorporated herein and made a part hereof; that said Bill of Particulars filed by plaintiff Sears, Roebuck and Co., and sworn to by R. G. Curry, Assistant Secretary of said Corporation, discloses that the Superior Court action arises from and is based upon the same alleged transactions for which Sears, Roebuck and Co. seeks to recover by the amended complaint on file in this court; that said Superior Court action, since its commencement on December 10, 1951, at all times has been, and now is, pending in the Superior Court of the State of California, in and for the County of Los Angeles, and the attachment issued in said action and levied upon property belonging to the defendant Frank R. Blade, has been at all times during the pendency of said Superior Court action, and now is, in full force and effect against the said property of defendant Frank R. Blade.

Dated this 12th day of April, 1954.

/s/ GERALD R. KNUDSON.

Subscribed and sworn to before me this 12th day of April, 1954.

[Seal] /s/ ESTHER LOPEZ,
Notary Public in and for the County of Los Angeles,
State of California.

[Endorsed]: Filed April 15, 1954. [102]

[Title of District Court and Cause.]

MEMORANDUM OPINION

The original complaint in this matter was filed on May 2, 1952. It was in three causes of action: the first for alleged liability under the Sherman Act; the second for alleged liability under the Clayton Act, and the third a count for damages for fraud.

Upon motions to dismiss, an order was made sustaining the motion to dismiss without leave to amend as to the first and second causes of action and sustaining the motion to dismiss as to the third cause of action with leave to amend, (see Sears, Roebuck v. Blade, 110 F.Supp. 96). After the filing of that memorandum, in February, 1953, appeal was taken by the plaintiffs but later abandoned, and on August 21, 1953, the plaintiff filed an amended complaint for damages for fraud in one cause of action.

The matter is before the court on a motion for summary judgment by defendant Blade, and on motions of the other defendants to dismiss or in the alternative for summary [156] judgment.

By its amended complaint the plaintiff seeks to recover damages for fraud from Blade (its former employee for many years), Metropolitan Engravers, Ltd., a corporation; Metropolitan Mat Service, Inc., another corporation; Gregory F. Duffy, Aubrey A. Duffy, and Walter Duffy, and Alfred Smutz, officers and directors of those two corporations, and Barnard Engraving Company, Inc., a corporation, and James G. Barnard and Margaret Davis, alleged to be the officers, agents and representatives of the Barnard Company.

The substance of the plaintiff's cause of action is alleged to be as follows: defendant Blade was employed by the plaintiff in the capacity of Advertising Manager for what it refers to as its Los Angeles Group of stores; as part of his duties as such Advertising Manager, he was required to negotiate and contract for the engraving of material which was to be used, and was used, by the plaintiff in connection with its advertising in newspapers; that from January 1, 1937, until the month of December, 1951, defendant Blade entered into and executed many contracts with the defendant Metropolitan Engravers, which company, in turn manufactured engravings which were sold to, and used by, the plaintiff in its newspaper advertising; that throughout the entire period the defendant Metro-

politan Engravers and its officers and agents "secretly, fraudulently, unfairly and deceptively conspired and agreed that the defendants 'Engravers' and 'Mat Service' would pay to the defendant Frank R. Blade, would receive and accept secret, fraudulent, unfair and deceptive rebates, profits or commissions in the sum of \$400.00 per month in consideration of which said defendant Blade would contract for all engraving to be purchased by [157] the Los Angeles Group of stores owned and operated by plaintiff with said defendant 'Engravers' and no other person, firm or corporation, and would permit them to charge and would procure plaintiff to pay them sums of money greatly in excess of the then going price for identical quantities of identical or similar engraving current in the Los Angeles market and at prices substantially in excess of the prices which plaintiff would have been charged by competitors of defendants for like quantities of engraving of like grade and quality. In particular it was agreed between said defendants that plaintiff would be charged and would pay to said defendant 'Engravers' sums of money based upon varying basic prices of \$.033 to \$.044 per unit of engraving, although the fair market price in the Los Angeles area and the prices concurrently charged other purchasers in said area who were competitors of plaintiff for like quantities of engraving of like grade and quality was \$.030, or less; and that, for extra work in connection with such engraving not included in such unit price, equivalent additional charges over and above the fair market price for

such extra work would be made by defendant 'Engravers' and paid by plaintiff."

It is further alleged in the complaint that prior to October 31, 1949, defendant Blade was instructed by plaintiff to contract for part of the engraving for the Los Angeles Group of stores with engraving firms other than the defendant Metropolitan Engravers; that thereupon the defendants and each and all of them, further contracted and agreed among themselves that the engraving business of the plaintiff should be divided between the defendant Metropolitan Engravers and the Barnard Company, and that no other person, firm or corporation should be allowed or permitted to secure any [158] such business; that the base price would be \$.044 per unit "and not at the fair market price in the Los Angeles area of \$.030, or less." It is also alleged that the Barnard Company and James G. Barnard and Margaret Davis also agreed to pay Blade a secret profit amounting to 15% of the gross amount of all moneys received from plaintiff for engraving done by the Barnard Company. It is further alleged that said agreements were carried out and executed by the defendants. The complaint has attached to it a list of payments beginning February 6, 1942, to November 29, 1951, and alleges that the total amount paid for engraving during that period was the sum of \$563,504.50; that the fair market value was the sum of \$141,979.95 less than the total figure. It is also alleged that the dates and amounts of purchases of engravings made by plaintiff from defendant Engravers during the period of time from on or about

January 1, 1937, until on or about February 5, 1942, and the total amount so charged by defendants and paid by the plaintiff during that period are unknown to the plaintiff. It is alleged that the difference between the fair market value and the amount paid by plaintiff to Barnard Co. was the sum of \$20,021.50.

The plaintiff then alleges that the total amount received by Blade from the Metropolitan Engravers and Metropolitan Mat Service was a sum in excess of \$50,000 and the amount paid to Blade by the Barnard Co. was \$8,250.

The circumstances of the discovery of fraud are alleged to be that all of the acts and agreements and conduct of the defendants, above described, were unknown to the plaintiff until on or about the 10th day of December, 1951; that on or about the 6th day of July, 1951, plaintiff received an anonymous letter to the effect that some unidentified [159] person who was engaged in purchasing for the plaintiff was engaged in receiving secret payoffs. The letter did not identify the party charged, but the letter caused the plaintiff to investigate those engaged in purchasing, which resulted in the discovery by them, on or about the 10th day of December, 1951, of the acts and conduct upon which it bases its claim for relief. The complaint seeks actual damages totaling \$162,001.45, and \$250,000 as exemplary or punitive damages.

Defendant Frank R. Blade has answered with the usual denials, and alleges that all claims prior to

May 2, 1949, are barred by the statute of limitations of California [C.C.P. § 339(1)] and that all acts prior to May 2, 1948, are barred by the provisions of Section 338 of the California Code of Civil Procedure; that all claims are barred by laches on the part of the plaintiff; and as a separate defense alleges in his sixth additional defense that prior to the filing of the Amended Complaint herein on August 21, 1953, and prior to the filing of the original complaint herein on May 2, 1952, and, to wit: On December 10, 1951, the plaintiff filed a complaint for money had and received in the Superior Court of the State of California in and for the County of Los Angeles, wherein the plaintiff herein was plaintiff therein and the defendants Frank R. Blade and Nella Blade were defendants; that the plaintiff in that case secured a writ of attachment under the provisions of Section 537 of the Code of Civil Procedure of the State of California and caused the same to be levied by the Sheriff of Los Angeles County; that in response to a demand for a bill of particulars, Sears, Roebuck filed a bill of particulars which contains, in substance, the same charges contained in the complaint [160] herein, and that by the filing of the Superior Court action the plaintiff made an election of remedies, resulting in damage or injury to the defendant Blade and that by virtue of such election of remedies, the plaintiff is estopped from maintaining the instant suit against Frank R. Blade.

The motion of defendant Blade for summary

judgment will be considered before discussing the motions of the other defendants.

Blade's motion for summary judgment is based upon the ground that plaintiff is estopped from asserting tort liability against him, in that plaintiff, by its suit and attachment in the Superior Court, made a decisive election of remedies.

The motion is based on the pleadings, including the verified answer of Blade and the affidavit of Mr. Knudson, which, in substance, contains all the factual matters set forth in the sixth separate defense of Blade. The facts therein alleged are denied; they are material. There is thus no genuine issue as to them, which postures the case for summary judgment as to Blade, under Rule 56 F.R.C.P., if, as matter of law, the suit and attachment in the State Court constitute such an election of remedy by the plaintiff as to estop it from pursuing the within action for alleged torts of Blade. *Miller v. Hoffman*, 1 F.R.D. 290.

The mere pursuit of a remedy does not necessarily estop a party from pursuing another inconsistent remedy. It frequently occurs that the remedy first pursued by a wronged party develops into no remedy at all, that is to say, it develops after trial, and even after appeal, that the plaintiff never had such a right or remedy to recover. An election of remedies presupposes the existence of two valid remedies. [161] If one turns out not to be valid, a plaintiff cannot be held to have made an election, because one cannot choose to have that to which he

is not entitled. As said in *Bierce v. Hutchins*, 205 U. S. 340, 347, "It does not purport to be a choice, and it cannot be one because the party has no right to choose." *Barnsdall v. Waltemeyer* (CCA 8, 1905), 142 F. 415, cert. den. 201 U. S. 643; *Southern Pacific Co. v. Bogert*, 1919), 250 U. S. 483; *Rankin v. Tygard*, 198 Fed. 795; *Brown v. Fletcher* (CCA 6, 1910), 182 Fed. 963, cert. den. 220 U. S. 611.

It is, however, also a settled proposition of law that where a person has two inconsistent remedies and pursues one, and by it gains an advantage over the other party, or causes him damage, then an election is deemed to have been made which operates as an equitable estoppel from pursuing another and different remedy. It is this doctrine upon which the defendants rely.

There are two necessary elements to this rule: (1) the remedies must be inconsistent, and (2) their first remedy pursued must result in disadvantage, damage, or detriment to the other party. *De Laval Pac. Co. v. United C. & D. Co.* (1924), 65 Cal. App. 584, 586.

The suit in the superior court was for money had and received—it is *ex contractu*; the suit here is *ex delicto*. They are inconsistent. *Equitable Trust Co. v. Connecticut Brass & Mfg. Corp.* 290 Fed. 712 (CCA 2, 1923); *Steiner v. Rowley* (1950), 35 Cal. 2d 713, 720; *Philpott v. Superior Court* (1934), 1 Cal. 2d 512, 520; *McCall v. Superior Court* (1934), 1 Cal. 2d, 527, 531. A writ of attachment will issue

under California C.C.P. § 527, in an action *ex contractu*, but not one *ex delicto*, which alone is a sufficient mark of [162] inconsistency. As said in *Hallidie v. Enginger* (1917), 175 Cal. 505, 508:

“Next, let it be remarked, that the common-law distinctions between actions *ex contractu* and actions *ex delicto* have not been changed by the permission to file rambling pleadings containing averments pertaining to both classes of actions, and even averments addressed to equity alone. And, finally, let it be remembered that our statute and statutes like ours grant a writ of attachment only in cases *ex contractu*, and therefore deny it, both in actions *ex delicto* and in actions where equitable relief as such is sought.”

The second necessary element for estoppel by election is also present here, i.e., securing an advantage in the state suit by getting the writ of attachment. *Steiner v. Rowley*, *supra*; *Estrada v. Alvarez* (1952), 38 Cal. 2d 386.

In the *Steiner* case, *supra*, the complaint was in four counts, one of which was for money had and received and another for fraud for secret profits by an agent of the plaintiff. An attachment was secured. The court said (p. 720), “* * * the Steiners also obtained an attachment. This was a positive act of a plaintiff ‘in pursuit of * * * [the contractual remedy] * * * whereby he has gained * * * advantage over the other party * * *’ (De Laval Pac. Co. v. United C. & D. Co., 65 Cal. App. 584, 586, 224 Pac. 766.) The Steiners were therefore estopped

to allege a cause of action in tort, and the demurrer to the fourth count (the tort count) was properly sustained."

In the Estrada case, *supra*, the court stated (p. 391), "As previously stated, plaintiffs pray, in the alternative, for damages for fraud. Their original complaint attempted to state a cause of action for damages for breach of contract (this attempt has been abandoned). In pursuit of this contract remedy plaintiff obtained an [163] attachment. They are, therefore, estopped to pursue the tort remedy of damages for fraud."

The plaintiff contends, however, that the doctrine of the above cases does not apply; asserting that the state court action was one to recover secret profits received by Blade in which the measure of damages was the amount of money received by him, whereas, here, the measure of damages is the detriment caused by the fact that Blade entered into the fraudulent agreements with his co-defendants and carried them out. No authority is cited in support of this contention.

The money received by Blade and sought to be recovered in the state court is part of the damages sought to be recovered in the instant action. The plaintiff has an attachment on Blade's property to secure his judgment in the state court if he obtains one. It has not dismissed the state action or released the attachment.

From the allegations of the complaint and from the undenied pleadings filed in the state action, it

appears that the acts of Blade with the defendants here, constituted one continuous wrong; and that the acts of Blade and the acts of his co-defendants in this case, were the basis of the suit in the state court. This is the only conclusion which can be reached from reading the pleadings in the within action and in the state court action, but it is emphasized by the following statements of the verified bill of particulars filed by the plaintiff in the state action:

“Secret profits received by Defendant Frank R. Blade for and on account of Sears, Roebuck and Co. but not accounted for or paid over to said company as follows: [164]

“(a) Sums amounting to Four Hundred Dollars (\$400.00) per month received by Frank R. Blade from January, 1937, to October, 1951, inclusive, a period of one hundred sixty-six months, from Metropolitan Engravers, Ltd., a corporation, and Metropolitan Mat Service, Inc., amounting to Sixty-six Thousand Four Hundred Dollars (\$66,400.00).

“(b) Sums received from Barnard Engraving Company (formerly known as Barnard-Quinn Co.) during the period from September, 1949, to and including November 1, 1951, amounting to Eight Thousand Five Hundred Eleven and 50/100 Dollars (\$8,511.50).”

These are the same acts which plaintiff relies on in the instant suit. The plaintiff seeks in this action to recover the identical money as it seeks to recover

in the state court action. While it seeks a greater sum of damages here than there, I cannot see how a different measure of damages for the same acts can create a right to two inconsistent remedies for those acts where, as here, the plaintiff by suit *ex contractu* in the state court waived the tort. The essence of the cause of action in both suits is the violation of the primary right which the plaintiff had to honest dealings by both Blade and his co-defendants here. It constituted a single cause of action.

As stated by the Supreme Court of California in *Wulfjen v. Dolton*, 24 Cal. 2d, 891, at 895, 896 (1944), "The violation of one primary right constitutes a single cause of action, though it may entitle the injured party to many forms of relief, and the relief is not to be confounded with the cause of action, one not being determinative of the other."

By electing to sue *ex contractu* in the state [165] court the plaintiff waived the tort by Blade, and one cannot waive half a tort by suing in contract and then sue in another case for the other half of the tort. When one sues *ex contractu*, whether on an express or implied contract, the bringing of that suit affirms the contract. It is the essence of the plaintiff's cause of action in the within case that it disaffirms and disavows the acts of Blade in letting contracts and receiving money from his co-defendants; it is the essence of the plaintiff's cause of action in the state court that the defendant Blade was under the obligation of an implied contract to

pay over to the plaintiff all moneys that he received.

In *Robb v. Vos*, 155 U. S. 1 (1894), at page 41, the court stated as follows:

“Thompson v. Howard, 31 Michigan, 309, 312, was a case where a father who had brought an action of assumpsit for a minor son’s wages, and, after the jury disagreed, had discontinued the suit, and brought an action for the unlawful enticing away and harboring the son. The Supreme Court said: ‘A man may not take contradictory positions; and where he has a right to choose one of two modes of redress, and the two are so inconsistent that the assertion of one involves the negation or repudiation of the other, his deliberate and settled choice of one, with knowledge, or the means of knowledge of such facts as would authorize a resort to each, will preclude him thereafter from going back and electing again. * * * [The plaintiff’s] proceeding necessarily implied that the defendant had the young man’s services during the time with plaintiff’s assent, and this was absolutely repugnant to the foundation of this suit, which is, that the young man was drawn away and into defendant’s service against the plaintiff’s assent.’

“In *Conrow v. Little*, 115 N. Y. 387, 393, 394, the court said: ‘The contract between Branscom and the plaintiffs was, upon the discovery of Branscom’s fraud, voidable at their election. As to him, the plaintiffs could affirm or rescind it. They could not do both, and there must be a time when their election should be considered final. We think that time

was when they commenced an action for the sum due under the contract, and in the course of its prosecution applied for [166] and obtained an attachment against the property of Branscom as their debtor. They then knew of the fraud practiced by him, and disclosed that knowledge in the affidavit on which the attachment was granted, and became entitled to that remedy because it was made to appear that a cause of action existed in their favor by reason of "a breach of contract to pay for goods and money loaned obtained by fraud." The attachment was levied and the action pending when the present action, which repudiates the contract and has no support except on the theory of its disaffirmance, was commenced. The two remedies are inconsistent. By one, the whole estate of the debtor is pursued in a summary manner, and payment of a debt sought to be enforced by execution; by the other, specific articles are demanded as the property of the plaintiff. One is to recover damages in respect of the breach of the contract, the other can be maintained only by showing that there was no contract. After choosing between these modes of proceeding, the plaintiffs no longer had an option. By bringing the first action, after knowledge of the fraud practiced by Branscom, the plaintiffs waived the right to disaffirm the contract, and the defendants may justly hold them to their election. The principle applied in *Foundry Company v. Hersee*, 103 N. Y. 26, and *Hays v. Midas*, 104 N. Y. 602, require this construction, for the present contains the element lacking in those cases, viz., knowledge of

the fraud practiced by the vendee; and by reason of it the plaintiffs were put to their election.

“ ‘It is not at all material to the question that the plaintiffs discontinued the first suit before bringing the present to trial, for it is the fact that the plaintiffs elected this remedy, and acted affirmatively upon that election, that determines the present issue. Taking any steps to enforce the contract was a conclusive election not to rescind it on account of any thing known at the time. After that the option no longer existed, and is of no consequence whether or not the plaintiffs made their choice effective.’ ”

The plaintiff cannot ratify half of the acts of Blade in dealing with his co-defendants by suit and attachment, where those acts are indivisible, as here, then sue in this court *ex delicto* not only for that half but as well for the additional half. So far as Blade is concerned he had one single indivisible obligation to his employer. He violated that obligation according to the complaint here [167] and in the state court. The plaintiff was confronted with making a decisive choice—it could sue Blade *ex contractu* and attach his property, thus securing itself by that attachment for any judgment it might ultimately get, and assuring itself thereby that it would get something back from Blade for his wrong to it before Blade could sequester the property—or it could forego that right and sue him *ex delicto* and take its chances on ever collecting a judgment. It was a choice with which every lawyer is confronted; whether to take the bird in hand by at-

tachment, or try to get two birds in the bush by a fraud action. It chose to take the bird in hand. It was a knowing choice with its advantage of attachment. The law says it was a decisive choice. And the law will not permit it to pursue both choices at the same time merely because by a fraud action it may be more nearly able to recoup a greater sum than in the *ex contractu* action.

By the allegations in the complaint in this action and the complaint and bill of particulars in the state action, Blade and his co-defendants here joined in a single wrong, namely, fraud upon the plaintiff, which the plaintiff elected to waive by bringing the state action. It cannot now split its causes of action into several suits. *Robb v. Vos*, *supra*; *Paladini v. Municipal Markets Co.* (1921), 185 Cal. 672; *Nightingale v. Scannell* (1855), 6 Cal. 506, at 509; *Herriter v. Porter* (1863), 28 Cal. 385 at 387; *Van Horne v. Treadwell* (1913), 164 Cal. 620 at 622; *Grain v. Aldrich* (1869), 38 Cal. 514 at 519.

The defendant Blade is entitled to summary judgment on his motion and that will be the order of the court. [168]

The Metropolitan Mat Service has filed a separate motion to dismiss which is based upon the contention that it is alleged in the plaintiff's amended complaint that the Mat Service, in joining in the payment of money to the defendant Blade, acted as the agent of Metropolitan Engravers, Ltd. Taking the complaint as a whole, it alleges that all of the parties acted together in making the agree-

ments and doing the things which are alleged to have been done in carrying out the unlawful agreements. I, therefore, can see nothing to the point made by the Metropolitan Mat Service as the allegations of the complaint are sufficient if it is otherwise sufficient against the contentions made in the motion to dismiss which was joined in by Metropolitan Mat Service and the other defendants, to which I will now turn my attention.

The joint motion to dismiss, of Metropolitan Engravers, Metropolitan Mat Service, the Duffys and Smutz, is [169] based on the following grounds: That the plaintiff's complaint failed to state a claim against any defendant upon which relief could be granted; that it affirmatively appears from the face of the complaint that plaintiff's cause of action is barred by the applicable statute of limitations and by laches; that the complaint fails to set forth each contract made between the plaintiff and the various defendants in separate counts, and that the plaintiff, having sued Frank R. Blade and secured an attachment in the Superior Court has made an election of remedies which bars it from pursuing the within action. The motions for summary judgment are made upon the same grounds and upon the further ground that there is no genuine issue as to the material fact that the suit was brought in the state court by plaintiff against Blade and that an attachment was issued and is still in force and effect.

I will discuss the question of estoppel first.

What has heretofore been said about splitting

causes of action in connection with the motion of the defendant Blade to dismiss is equally applicable to the remaining defendants.

The basis of the plaintiff's complaint in the instant matter is that all of the defendants joined in one continuous act or one continuous series of acts to defraud the plaintiff. It was one fraud. It was not two frauds, one committed by Blade and one by the other defendants, but according to the allegations of the complaint they all joined, and that is the only basis upon which the plaintiff would be entitled to recover. That being so, the election of the plaintiff to sue in the state court *ex contractu* and the securing of the attachment against Blade, affirmed the [170] acts of Blade in dealing with the other defendants and the plaintiff is now estopped to bring the within suit against any of them. *Robb v. Vos*, *supra*; *Insurance Co. of North America v. Fourth Nat. Bank*, 28 F. 2d 933 (CCA 5, 1928), cert. denied 279 U. S. 853.

While the foregoing is sufficient to dispose of the action, I feel obliged to express my views on the other points raised by the motions to dismiss, in order that any appeal taken will give opportunity for their review.

I will consider first the applicability of the Statute of Limitations.

The statute of limitations may be raised on a motion to dismiss. *Suckow Borax Mines Consolidated v. Borax Consolidated*, 185 F. 2d 196, 204; *Gossard v. Gossard*, 149 F. 2d 111.

The controlling statute of limitations is Section

338 of the California Code of Civil Procedure, subdivision 4, which limits the right to bring an action on the ground of fraud or mistake to three years and also provides, "the cause of action in such case not to be deemed to have accrued until the discovery, by the aggrieved party of the facts constituting the fraud or mistake."

The original action was filed here on May 2, 1952. The amended complaint, under Section 15(c) F.R.C.P., related back to the date of filing the original complaint. It is clear, therefore, that the statute of limitations has not run against any right of the plaintiff to recover within three years prior to May 2, 1952. The plaintiff, in filing the amended complaint, has endeavored to get around the statute of limitations by allegations showing its failure to discover the fraud, when the discovery was made, and how [171] it was made, and why it was not made sooner, under the authority of *Prentiss v. McWhirter*, 63 F. 2d 712, and other cases cited in my previous memorandum, 110 F. Supp. 96.

The allegations in the amended complaint of the plaintiff in that respect are, in substance, that the plaintiff had no knowledge of the acts and conduct of the defendants, or of the losses and damage suffered by the plaintiff at any time or times prior to or until on or about December 10, 1951. It alleges that the discovery of the fraud occurred as a result of an anonymous letter received by it on or about the 6th day of July, 1951, stating that some unidentified person who engaged in purchasing for plaintiff was receiving secret payoffs; that the letter

did not identify or contain any information from which plaintiff could identify either the person in their employ or the person or persons from whom the purchases were being made or the transactions involved; that upon receipt of the letter plaintiff commenced and conducted an investigation as a result of which it discovered that the defendant Blade had personally received a check in the sum of \$400 from the defendant Metropolitan Mat Service; that thereupon, and on or about the 10th of December, 1951, upon questioning by plaintiff, the defendant Blade admitted that he had been receiving secret payments, rebates and commissions from other defendants in the within matter in connection with the purchase of engravings; that following a further investigation the plaintiff discovered for the first time the "excessive and unfair rates and prices for engraving" that had been, and were, being charged and collected by said other defendants from the plaintiff; that the plaintiff had at all times prior to December 10, 1951, believed that its employee, [172] Blade, was an experienced, competent, loyal and devoted employee, and reposed complete confidence in the said defendant Blade in connection with the performance of his duties as Advertising Manager; that by reason of its confidence and reliance upon Blade and the secrecy of the agreements and conspiracies and payment by the defendants and receipt by Blade of moneys, the plaintiff did not discover and had no knowledge or means of knowing or learning of the occurrences or the acts made and done pursuant thereto.

While the plaintiff attached to its complaint the

summary of payments for only the period beginning February 6, 1942, it nevertheless alleges that the defendants had been engaged in the same conduct since on or about January 1, 1937, a period of more than 15 years prior to the filing of the complaint.

The measure of the right of the plaintiff to recover against the defendants is the difference between what is alleged to be the "fair market price in the Los Angeles area and the prices concurrently charged other purchasers in said area who were competitors of plaintiff, in like quantities of engraving of like grade and quality was \$.030 or less," whereas, the price charged by the defendants and paid by the plaintiff was the sum of \$.044 per unit of engraving. The crucial question is whether or not the plaintiff has met the test set down in *Prentiss v. McWhirter*, *supra*. I do not think it has.

The court can take judicial notice that the plaintiff is a large concern; that its sales run into many millions, if not hundreds of millions, of dollars per year; that it uses cuts and engravings in advertising in newspapers and for many years has used cuts and engravings in [173] catalogs. I think I am justified in taking judicial notice of these facts as the court is supposed to know what everybody else knows and I think every farm boy in America is acquainted with a Sears & Roebuck catalog. I think that the court is also justified in presuming that the plaintiff, in the conduct of its business, with the volume which it does in the many states of the Union where it operates, requires the services of auditors. It taxes the credulity too much to

believe that the plaintiff, over a fifteen-year period with a volume of business which it did generally and the volume of business which it did in the advertising field requiring cuts and engravings, could not have, with reasonable diligence, ascertained and learned of the peculations of the defendant Blade and the alleged fraud of the other defendants. Moreover, the complaint shows that it had knowledge that the going price was \$.030 and surely the plaintiff must have known that during that fifteen-year period it was paying \$.044. The complaint is significantly barren of any allegation that the plaintiff did not know and had no means of ascertaining through the fifteen-year period that it could have secured the engravings at a lesser price per unit. And, as just indicated, the allegation is exactly to the contrary.

The complaint does not state a claim for relief against Metropolitan Engravers, Metropolitan Mat Service, the Duffys or Smutz for any damages accruing prior to May 2, 1949.

It is next asserted that the complaint does not state a claim for relief because it does not set forth the date of each contract by which plaintiff was defrauded, or the amount involved. On the authority of the cases there cited, I so held in the previous memorandum (110 F. Supp. 96 at 103). But on further consideration, while [174] convinced of the desirability of such allegations, I do not regard the lack of them to be fatal, in view of the discovery proceedings, and in view of plaintiff's election to treat the conduct of defendants as one wrong only.

In summary: The motion of defendant Blade for summary judgment on the ground of estoppel is granted; and the motions of all other defendants to dismiss is granted on the ground of estoppel.

In accordance with the local rules the defendant Blade submitted proposed Findings of Fact and Conclusions of Law in support of his motion to dismiss. The plaintiff will have five (5) days under the local rules to except thereto, after which the court will settle those findings and sign the summary judgment in favor of defendant Blade.

Inasmuch as the entire case will be disposed of by the foregoing, Rule 54(b) is not applicable.

Counsel for defendants, Metropolitan Engravers, et al., will prepare and submit a judgment of dismissal.

Dated at Los Angeles, California, this 29th day of June, 1954.

/s/ PEIRSON M. HALL,
Judge.

[Endorsed]: Filed June 29, 1954. [175]

[Title of District Court and Cause.]

FINDINGS OF FACT,
CONCLUSIONS OF LAW

This matter came on regularly for hearing on the 26th day of April, 1954, before Honorable Peirson M. Hall, Judge of the above-entitled court, on the motion of defendant Frank R. Blade for a summary

judgment as a matter of law, pursuant to Rule 56b of the Federal Rules of Civil Procedure on the ground that, as set forth in said defendant's Sixth Affirmative Defense, plaintiff herein has heretofore finally and conclusively elected to pursue a separate, inconsistent remedy against this defendant and is estopped and precluded from proceeding with this action; and the Court having considered the pleadings filed in this action and the affidavit submitted in support of the motion, there being no counter-affidavits filed in opposition thereto, and the Court having heard arguments of counsel, and having considered the Points and Authorities submitted in support of and in opposition to said motion for summary judgment, and being [176] fully advised in the premises, now makes its Findings of Fact and Conclusions of Law as follows:

Findings of Fact

I.

Prior to the filing of the amended complaint herein, on August 21, 1953, and prior to the filing of the original complaint herein, on May 2, 1952, namely, on December 10, 1951, the plaintiff herein, Sears, Roebuck & Co., filed a complaint designated, "Complaint (for money had and received)," in the Superior Court of the State of California, in and for the County of Los Angeles, in a proceeding entitled "Sears, Roebuck & Co., a New York corporation, Plaintiff, vs. Frank R. Blade and Nella Blade, Defendants"; that said action is number 593463 on the records of the Clerk of said Court;

that by virtue of said Superior Court action, the plaintiff, Sears, Roebuck & Co., seeks to recover from said defendants the sum of \$75,000.00 for moneys allegedly received by said defendants before December 1, 1951, for the use of the plaintiff; that on said December 10, 1951, the plaintiff, Sears, Roebuck & Co., caused a summons to be issued in said action; that a true and correct copy of the said complaint filed by Sears, Roebuck & Co. in the Superior Court action is attached to the answer filed herein by the defendant, Frank R. Blade, and is marked Exhibit A; that the defendant, Frank R. Blade, named in said complaint and amended complaint in the aforesaid Superior Court action, is the same person as the answering defendant, Frank R. Blade, in this proceeding in the United States District Court, and on whose behalf the instant motion for summary judgment is filed.

II.

At the time the summons was issued in said Superior Court action, the plaintiff, Sears, Roebuck & Co., caused to be filed therein an affidavit for attachment against resident, a true and correct copy of which is attached to the answer of this defendant to the amended complaint, marked Exhibit B; that said affidavit for attachment [177] against resident was prepared and sworn to by Russell G. Curry, the Assistant Secretary of plaintiff, Sears, Roebuck & Co., and declares that the defendants in said Superior Court action are indebted to Sears, Roebuck & Co. in the sum of \$75,000.00 together with interest thereon at the rate of 6% per annum from

December 1, 1951, upon an implied contract for the direct payment of money, that the defendants, including this defendant, were indebted to plaintiff in said sum for moneys had and received for the use and benefit of the plaintiff, that such contract was made or is payable in California, and that the payment of said contract was without security.

III.

At the time the summons was issued in said Superior Court action, the plaintiff, Sears, Roebuck & Co., caused to be filed therein a Statement to Clerk on Attachment, a true and correct copy of which is attached to the answer of defendant, Frank R. Blade, herein, to the amended complaint herein, marked Exhibit C; that said Statement to Clerk on Attachment was prepared and executed by John L. Wheeler, Esq., attorney for plaintiff, Sears, Roebuck & Co., in said Superior Court action, and stated, among other things, that plaintiff had commenced, or was about to commence an action in the Superior Court of the County of Los Angeles, against the defendants, including this defendant, upon an implied contract for the direct payment of money and claiming that there was due to the plaintiff from said defendants the sum of \$75,000.00.

IV.

At the time summons was issued in said Superior Court action, the plaintiff, Sears, Roebuck & Co., caused to be issued therein a Writ of Attachment, a true and correct copy of which is attached to the answer of defendant Frank R. Blade to the

Amended Complaint herein, marked Exhibit D; that Sears, Roebuck & Co. caused said attachment to be levied upon substantial property belonging to the defendant, Frank R. Blade. [178]

V.

Thereafter, and pursuant to a demand for a Bill of Particulars made by the defendants in said Superior Court action, the plaintiff, Sears, Roebuck & Co., which is also the plaintiff in this action, filed a verified Bill of Particulars in said Superior Court action, a true and correct copy of which is attached to the answer of defendant Frank R. Blade to the amended complaint herein, marked Exhibit E; that said Bill of Particulars filed by plaintiff Sears, Roebuck & Co., and sworn to by R. G. Curry, Assistant Secretary of said corporation, discloses that the Superior Court action arises from and is based upon the same alleged transactions for which Sears, Roebuck & Co. seeks to recover by the amended complaint on file in this court; that said Superior Court action, since its commencement on December 10, 1951, at all times has been, and now is, pending in the Superior Court of the State of California, in and for the County of Los Angeles, and the attachment issued in said action and levied upon property belonging to the defendant, Frank R. Blade, has been at all times during the pendency of said Superior Court action, and now is, in full force and effect against the said property of defendant Frank R. Blade.

VI.

There is no genuine issue as to any material fact

set forth in the Sixth Affirmative Defense of defendant Frank R. Blade.

VII.

There is no just reason for delay in entering this summary judgment in favor of defendant Frank R. Blade and the Clerk is directed to enter summary judgment in favor of defendant Frank R. Blade forthwith in accordance with Rule 54b of the Federal Rules of Civil Procedure.

VIII.

All of the facts set forth in the Memorandum Opinion filed June 29, 1954, and not specifically set forth herein are found to be [179] true.

Conclusions of Law

I.

By this action the plaintiff herein claims damages for alleged fraud and thus seeks to pursue a tort remedy against the defendant, Frank R. Blade, which is separate from, and inconsistent with, that sought by said plaintiff against said defendant in the Superior Court contractual action based upon an alleged implied contract filed prior to the institution of this action which Superior Court action is presently pending.

II.

By filing the aforesaid contractual action in the Superior Court and causing an attachment to be issued therein and levied upon substantial property of the defendant, Frank R. Blade, plaintiff has taken positive action with full knowledge of its

rights and the facts, whereby it has gained an advantage over the defendant, Frank R. Blade, to said defendant's detriment and damage.

III.

Plaintiff has heretofore made a final and conclusive election of the remedies it may pursue against the defendant, Frank R. Blade, and is thereby estopped and precluded from proceeding with this action.

IV.

Defendant Frank R. Blade is entitled to summary judgment in his favor.

V.

There is no just reason for delay in entering this summary judgment in favor of defendant Frank R. Blade and the Clerk is directed to enter summary judgment in favor of defendant Frank R. Blade forthwith in accordance with Rule 54b of the Federal Rules of Civil Procedure.

VI.

All Conclusions of Law set forth in the Findings of Fact and [180] in the Memorandum Opinion filed June 29, 1954, and not specifically set forth herein are found to be Conclusions of Law.

Dated: Sept. 1, 1954.

/s/ PEIRSON M. HALL,
United States District Judge.

Affidavit of Service by Mail attached.

[Endorsed]: Filed September 1, 1954. [181]

In the District Court of the United States,
Southern District of California

No. 14079-PH

SEARS, ROEBUCK & CO., a Corporation,
Plaintiff,

vs.

FRANK R. BLADE, et al.,

Defendants.

SUMMARY JUDGMENT

This matter came on regularly for hearing on the 26th day of April, 1954, before Honorable Peirson M. Hall, Judge of the above-entitled Court, on the motion of defendant Frank R. Blade for a summary judgment as a matter of law, pursuant to Rule 56b of the Federal Rules of Civil Procedure, and the Court being fully advised in the premises, and having heretofore filed herein its Findings of Fact and Conclusions of Law,

Now, therefore, by reason of the Findings and Law aforesaid, the Court finds that the defendant, Frank R. Blade, is entitled to a summary judgment as a matter of law and that there is no just reason for delay in entering such summary judgment in favor of said defendant Frank R. Blade,

It Is, Therefore, Ordered, Adjudged and Decreed that the motion of defendant Frank R. Blade for summary judgment be, and the same is, hereby granted, pursuant to Rule 56b of the Federal Rules of [184] Civil Procedure, that there is no just reason for delay in entering this summary judgment

in favor of said defendant Frank R. Blade, that the Clerk be, and hereby is, directed to enter summary judgment in favor of defendant Frank R. Blade forthwith in accordance with Rule 54b of the Federal Rules of Civil Procedure, that the plaintiff recover nothing by its suit, and that the defendant, Frank R. Blade, go hence without day and recover his costs and charges in this behalf expended and for execution therefor.

Costs taxed favor Deft., \$73.20.

Dated Sept. 1, 1954.

/s/ PEIRSON M. HALL,
United States District Judge.

Lodged July 28, 1954.

[Endorsed]: Filed September 1, 1954.

Entered September 2, 1954. [185]

[Title of District Court and Cause.]

JUDGMENT OF DISMISSAL ON MERITS
FOR FAILURE TO STATE A CLAIM
UPON WHICH RELIEF CAN BE
GRANTED

Upon motion of defendants Metropolitan Engravers, Ltd., Metropolitan Mat Service, Gregory F. Duffy, Aubrey A. Duffy, Alfred Smutz and Walter C. Duffy to dismiss the complaint, and upon the first defense in the answer alleging that the complaint fails to state a claim upon which relief can

be granted, it is ordered that the motion be sustained, and the cause dismissed with prejudice as of this date, and that all costs in the proceeding be taxed upon the plaintiff, Sears, Roebuck & Co., in the sum of \$.....

Ordered, Adjudged and Decreed this, the 1st day of September, 1954.

/s/ PEIRSON M. HALL,

United States District Judge.

Approved as to Form Under Rule 7.

JOHN L. WHEELER,

FRESTON & FILES and

EUGENE D. WILLIAMS,

By /s/ EUGENE D. WILLIAMS,
Attorneys for Plaintiff.

[Endorsed]: Filed September 1, 1954.

Docketed and entered September 2, 1954. [187]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Plaintiff hereby appeals to the Court of Appeals for the Ninth Circuit from that certain judgment of dismissal in favor of defendants Metropolitan Engravers, Ltd., a corporation; Metropolitan Mat Service, Inc., a corporation; Gregory F. Duffy; Aubrey A. Duffy; Alfred Smutz and Walter C.

Duffy, and that summary judgment in favor of the defendant, Frank R. Blade, and both of said judgments and the whole thereof, entered September 2, 1954, by the Clerk of the above-entitled Court.

Dated: September 29, 1954.

JOHN L. WHEELER,
FRESTON & FILES and
EUGENE D. WILLIAMS,
By /s/ EUGENE D. WILLIAMS,
Attorneys for Plaintiff and
Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed September 29, 1954. [188]

[Title of District Court and Cause.]

STATEMENT OF POINTS

The points upon which appellant will rely on appeal are:

1. That the Court erred in dismissing the complaint herein as against the defendants, Metropolitan Engravers, Ltd., a corporation; Metropolitan Mat Service, Inc., a corporation; Gregory F. Duffy; Aubrey A. Duffy; Alfred Smutz and Walter C. Duffy, and each of them.
2. That the Court erred in entering a judgment of dismissal against the plaintiff and in favor of said above-named defendants, and each of them.

3. That the Court erred in entering a summary judgment in favor of the defendant, Frank R. Blade.

4. That the Court erred in holding that the sixth separate defense set forth in the answer of the defendant, Frank R. Blade, stated a defense to the claims set forth in the complaint. [190]

5. That the Court erred in holding that there is no genuine issue as to any material fact set forth in the sixth affirmative defense of defendant Frank R. Blade.

Dated: September 29, 1954.

JOHN L. WHEELER,
FRESTON & FILES and
EUGENE D. WILLIAMS,
By /s/ EUGENE D. WILLIAMS,
Attorneys for Plaintiff-
Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed September 29, 1954. [191]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages, numbered from 1 to 195, inclusive, contain the original Amended Complaint for Damages for Fraud; Answer of Frank R. Blade to Amended Complaint; Notice of Motion, Motion to Dismiss or for Summary Judgment, Affidavit of William J. Clark and Points and Authorities; Notice of Motion for More Definite Statement, Motion and Memorandum of Authorities; Notice of Motion and Motion to Dismiss with Points and Authorities; Notice of Motion of Defendant Frank R. Blade for Summary Judgment; Supplemental Points and Authorities in Support of Motion of Defendant Frank R. Blade for Summary Judgment; Memorandum of Points and Authorities in Opposition to Motions of Defendants to Dismiss or for Summary Judgment; Closing Memorandum of Defendants Metropolitan Engravers, Ltd., et al.; Reply Memorandum in Support of Motion of Defendant Frank R. Blade for Summary Judgment; Memorandum Opinion; Findings of Fact and Conclusions of Law; Summary Judgment; Judgment of Dismissal on Merits for Failure to State a Claim Upon Which Relief Can Be Granted; Notice of Appeal; Statement of Points and Designation of Record on Appeal which constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$2.00, which sum has been paid to me by the appellant.

Witness my hand and the seal of said District Court this 25th day of October, A.D. 1954.

[Seal]

EDMUND L. SMITH,
Clerk;

By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 14564. United States Court of Appeals for the Ninth Circuit. Sears, Roebuck & Co., a Corporation, Appellant, vs. Metropolitan Engravers, Ltd., Metropolitan Mat Service, Inc., Gregory F. Duffy, Aubrey A. Duffy, Alfred Smutz, Walter C. Duffy and Frank R. Blade, Appellees. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed October 26, 1954.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.